Neutral Citation: [2012] IEHC 610

THE HIGH COURT

[2008 No. 5797 P]

BETWEEN

CYRIL REANEY AND ITA O'REGAN AND TRAVALON LIMITED

PLAINTIFFS

AND

INTERLINK IRELAND LIMITED T/A DPD

DEFENDANT

JUDGMENT of Mr. Justice Gilligan delivered on the 31st day of July, 2012

1. The first and second named plaintiffs are a married couple and the third named plaintiff is a limited liability company, having its registered office at Main Street, Whitegate, Middleton in the County of Cork.

2. The defendants "Interlink" are a subsidiary of La Poste and currently trade as DPD Ireland and they operate a network of franchises throughout Ireland which are involved in courier activities, mainly collection and delivery of parcels and letters.

3. The North and East Cork franchise area was acquired by the plaintiffs from the defendants for IR£8,000 (€10,157) in December, 1986 and the additional franchise area of South and West Cork was acquired in December, 1995 for a consideration of IR£115,000 (€146,000).

4. In July, 2000 the plaintiffs sold the West Cork franchise business for IR£46,750 (€59,360) and in June, 2005 sold off the North and East Cork area for €175,000. Following these transactions the remaining franchise area related to depot 28 and this represents part of the area acquired in 1995, and the sum of €95,000.00 is appropriately apportioned thereto.

5. The franchise agreement entered into between the plaintiffs provided that the agreement would continue until terminated by not less than six months written notice by either party. On 23rd September, 2009, Interlink gave six months notice of termination to the plaintiffs to expire on 31st March, 2010, pursuant to s. 13 of the Franchise Agreement.

6. There is no dispute that the defendant was entitled to terminate the plaintiffs franchise pursuant to clause 13. There is further no dispute that clause 13 applies as at the date of the notice, being 23rd September, 2009.

7. The principal issue that arises in these proceedings is to determine the effect of clause 13 and further, to determine the appropriate sum of money pursuant to clause 13 to compensate the plaintiffs in respect of the termination of the defendants franchise for franchise area relating to depot 28.

8. Three other aspects of dispute between the plaintiffs and the defendant also need to be determined and these relate solely to the amounts of money to which the plaintiffs may be entitled to in respect of compensation.

9. These are:-

A. A claim by the plaintiffs in respect of lost commission due to under weighing of parcels known as "parcel line consignments" and in this regard, a figure has been agreed subject to liability in the sum of €31,900.

B. The plaintiffs claim a loss in respect of what is described as 1L4 account. This aspect arises out of a notification issued by Interlink on 21st December, 2006, stating that the new rates basis in respect of the 1L4 account would apply from 1st January, 2007, and effectively, this altered the rate of commission to which the plaintiffs were entitled. They contend that this occurred without any negotiation or consultation and that the change in the methodology for computing commission is considered unreasonable and was issued without reasonable notice in breach of the franchise agreement. The reduction in commission paid from the date of the change, being the 1st January, 2007, until it was changed to a flat on 1st June, 2008, results in a difference between the commissions that were originally applied and allowing for reasonable notice of eighteen months amount to a sum which is agreed between the parties at €20,954. Mr. Reaney in evidence took the view that six months would have been reasonable notice and accordingly, the maximum amount claimable is €6,984.66. Two issues arise for determination here, the first being as to whether or not the plaintiffs are entitled to any compensation having regard to the provisions of the franchise agreement and if they are so entitled, what in the circumstances would be deemed to have been reasonable notice.

C. The plaintiffs claim a loss arising out of what is known as the "pulsar account". The plaintiffs contend that when this account was opened in April, 2008 it was agreed that the franchisees would be paid what has been referred to as their normal commission rate of €1.68 up to 25kgs and 0.04 per kilogram thereafter for a trial period. After this trial period ended the franchisees were to receive a royalty of €0.50 per consignment for customer service and the trial period was then extended and the franchisees continued to receive the commission rate of €1.68 up to 25kgs and 0.04 per kg thereafter up to the end of March, 2009.

The defendants then proceeded to recover the commission paid to the franchisee at this rate for the trial period and this was done by deducting a trunking charge of€40 per day from the plaintiffs' commission payments. The defendants contend that they were entitled to the return of these monies and the plaintiff disputes this contention.

D. further, the plaintiffs claim interest on such amount if any as the court finds is properly due and owing to the plaintiffs.

10. Two other issues arise for determination as follows.

> (i) Do the plaintiffs satisfy the court on the balance of probabilities in respect of an allegation as made by the plaintiffs against the defendants that they were guilty of fraud in respect of the under weighing of the parcel line consignments of parcels?
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> (ii) Is the restraint of trade clause as contained in Clause 16 of the franchise agreement reasonable in all the circumstances and enforceable? Clause 16 states:-
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> "16. In the event of the termination hereof howsoever caused the operator shall not directly or indirectly whether as an agent or an employee of any other person;
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> 16.1 for a period of eighteen months operate or be engaged in a business which actually does or is likely within one year to compete with that of the owner of any franchise of the owner within the operator's territory;
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> 16.2 for a period of eighteen months solicit any customer of the owner or any franchisee or any former customer of the operator hereunder."

11. I propose to deal with the aspect of the restraint of trade clause first.

12. At first sight the period of eighteen months could be construed as marginally excessive but it has to borne in mind that this is very much a commercial transaction as opposed to an employer/employee situation. The particular clause is limited geographically to the operators territory and clearly there is a benefit to the plaintiffs in the particular circumstances because in selling the franchise or in having the franchise valued the clause, in effect, prevents the plaintiffs/franchisees in the particular circumstances of this case from engaging in a business which actually does or is likely to compete with the new purchaser of the particular franchise in respect of the particular operators territory. Accordingly, I am satisfied that there is a protection mechanism in place for the franchisor and a benefit for the franchisee in selling the franchise or having it valued whereby the particular clause protects a would be purchaser, for a review of eighteen months. Furthermore the first and second named plaintiffs had the benefit of the restraint of trade covenant when they bought the business in the first instance.

13. I also have regard to the fact that the nature of the business in question is such that the plaintiffs and the defendants are part of a network, all of the elements of which are independent and thus in all the franchises around Ireland each of the franchisees is dependent on the customer base of the entire network being protected.

14. I take the view that on any interpretation of Clause 16, the plaintiffs were entitled to compete with the defendants at any place outside the specific territory the subject matter of the agreement and, in the particular circumstances of this situation, that is a very narrow territory when taken in the context of the whole of Ireland and could not, for example, be compared with the relatively severe restraint of trade clause in *O'Brien's Irish Sandwich Bars Limited v. Ann Marie Byrne* [2005] IEHC 12 at 21, where the restraint of trade clause limited the defendant in respect of two different premises for a period of one year after the termination of an agreement not be directly or indirectly engaged, concerned or interested in a business which would compete with the business of the plaintiff within a radius of one mile from the relevant premises. The two relevant premises were situate in Dame Street and Suffolk Street, and clearly the restraint of not competing within a one mile radius from either clearly takes out the entire of the centre of the City of Dublin. Ms. Justice Laffoy took the view in the particular circumstances that the restraint of trade clause was lawful.

15. In the course of her judgment Laffoy J. noted that there was no dispute as to the applicable law with both parties relying on the judgment of Costello J. in *John Orr Limited and Vestcom B.V v. John Orr* [1987] ILRM 702 wherein he stated as follows:-

> "All restraints of trade in the absence of special justifying circumstances are contrary to public policy and are therefore void. A restraint may be justified if it is reasonable in the interests of the contracting parties and in the interests of the public. The onus of showing that a restraint is reasonable as between the parties rests on the person alleging that it is so. Greater freedom of contract is allowable in a covenant entered into between the seller and buyer of a business than in the case of one entered into between an employer and an employee. A covenant against competition entered into by a seller of a business which is reasonably necessary to protect the business sold is valid and enforceable. A covenant by an employee not to compete may also be valid and enforceable if it is reasonably necessary to protect some proprietary interest of the covenantee such as may exist in a trade connection or trade secrets. The courts may in some circumstances enforce a covenant in restraint of trade even though taken as a whole the covenant exceeds what is reasonable by the severance of the void parts from the valid parts."

16. I am satisfied that Clause 16 is limited in time although I accept that eighteen months is at the upper limit of a reasonable period of time in the circumstances. The clause is limited in geographical area to the operator's territory and in the overall context of the geographical area of the defendants business, the particular limitation could not be considered as unreasonable. The scope of the clause is limited to a business in actual competition with that of the defendants. The clause pertains to the situation that arises between a seller and a buyer of a business and allows for greater latitude as compared to a contractual relationship between an employer/employee.

17. I consider that the content of Clause 16 is reasonable and proportionate having regard to the facts involved, and having regard to the limit and nature and scope of the clause, it does not in my view go further than to afford adequate protection to the defendant in all the circumstances.

18. I turn now to the issue of the allegation by the plaintiffs that the defendants fraudulently and/or wrongfully deprived them of income or profit rightly due to them under the franchise agreement or in the alternative, the defendant was guilty of negligence and the issue as to whether the plaintiffs are entitled to the sum of €31,500 as agreed subject to liability. The allegation of fraud as made by the plaintiffs is effectively an allegation of deceit and/or fraudulent misrepresentation. The plaintiffs allege that the defendant persistently, consciously, deliberately and fraudulently imputed indiscriminate weights in relation to Parcel Line consignments. The defendants contend that the allegation of fraud is utterly unwarranted having regard to the evidence adduced before the court.

19. It is quite clear that since the inception of the defendant's contract with Parcel Line, in the United Kingdom, the agreement was to the effect that each Parcel Line consignment would be delivered within the defendants network throughout Ireland on a fixed consignment fee basis, where as the arrangement the defendant had with its franchisees, including the plaintiffs, was that they would be paid a fixed fee for Parcel Line consignments up to 25kg and a further fee per kg above 25kg.

20. It is not too clear as to whether or not Parcel Line UK would have had a concern as regards the weight that was alleged for any particular consignment but what is clear is that the weights that were put on by a number of Parcel Line's customers were inaccurate and on the low side and on arrival at the defendants depot, they did not have the means to weigh each particular consignment and nominal weights were placed on each package and this situation prevailed up until May, 2007 when a working weighing system was put in place and from May, 2007 onwards the defendants were in a position to know exactly the weight of each consignment, and as conceded in evidence on the defendants behalf from May, 2007 they were in a position to calculate precise payments that should have been made to each of their franchisees, including the plaintiffs. It was contended on the defendants' behalf that payments in excess of 25kg were only made on a goodwill basis, but I am satisfied on the evidence on the balance of probabilities that the situation contended for by the defendants does not represent the agreement that was in place and the legitimate expectation which was always realised on the plaintiffs behalf that they would be paid a specified sum for each consignment up to 25kg and thereafter at a specified rate per additional kg. Accordingly, in my view the payments as made by the defendants in this regard were not made on a goodwill basis and the plaintiffs were entitled until the agreement ceased to be paid the additional agreed figure for each additional kg. In this regard the parties reached a compromise figure on the amount that was due by the defendants to the plaintiffs in the sum of €31,900.00. In the particular circumstances I am satisfied that the plaintiffs are entitled to recover this sum in full from the defendants and the only remaining issue for deliberation is as to whether or not the defendants were guilty of deceit and/or fraudulent misrepresentation.

21. I am satisfied in following the judgment of Finlay Geoghegan J. in *McAleenan v. AIG Europe Limited* [2010] IEHC 128, that in order to sustain an action of deceit there must be proof of fraud and nothing short of that will suffice, and that fraud is proved when it is shown that a false representation is made knowingly or without belief in its truth or recklessly and carelessly as to whether it be true or false.

22. The issue as regards the question of the Parcel Line weights was raised at an early stage by the plaintiffs herein with the defendants and the general indication was given that the matter would be looked into. The reality in the background was that a very substantial number of the Parcel Line consignments were all under 25kg and thus, a problem did not arise as regards the weights indicated. As regards the balance of the Parcel Line consignments the reality appears to have been that a proportion bore an incorrect weight designation, both from Parcel Line in the United Kingdom and in respect of the weight allocated to the consignment by the defendant at its depot in Athlone. The defendants knew that the weights were under stated to a not insignificant extent and had to know that unless the franchisee picked it up, the defendants would save on commission that was properly due to the franchisee in respect of consignments weighing over 25kg. If the franchisee did pick up an excess weight, then it appears the defendants would accept whatever weight was telephoned in and would pay commission accordingly. It is difficult to reconcile the evidence as adduced on the defendants behalf that they had no proper weighing system in place prior to 2007, but certainly since May, 2007 there was a proper weighing system in operation and yet the defendants chose not to rely thereon for the purpose of adjusting and paying the plaintiffs herein as their franchisee's the appropriate commission that was due on each consignment weighing over 25kg. The combination of the early indication on the defendants behalf that the question of the incorrect weights being displayed on Parcel Line consignments would be looked into when they knew that such a proposal was not possible because on their own evidence they had no proper weighing system in place with the combination that from May, 2007 they had all the relevant information available to properly adjust the commission as payable lead to an inevitable conclusion that the defendants were negligent in failing to have any due regard for the position in this instance of their franchises.

23. As regards the applicable law, pertaining to an allegation of fraud, I have regard to the matters as set out by Shanley J. in *Forshall & Fine Arts Collection Limited v. Walsh* (Unreported, the High Court, 18th June, 1997) wherein he stated:-

> "(a) A plaintiff seeking to establish the commission of the tort of fraud or deceit must prove;
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> (i) the making of a representation to a past of existing fact for the defendant;
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> (ii) that the representation was made knowingly or without belief in its truth or recklessly, carelessly whether it be true or false.
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> (iii) that it was intended by the defendant that the representation should be acted upon by the plaintiff
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> (iv) that the plaintiff did act on foot of the representation, and
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> (v) suffered damages as a result.
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> Where fraudulent misrepresentation is alleged it must be established that the representation as defined above was intended to and did induce the agreement in respect of which the claim for damages arises."

24. There can be no doubt in this case on the evidence that the defendants, their servants or agents made a representation as regards the weight attaching to the various Parcel Line consignments, and that the representation of the weight was made knowingly or without belief in its truth or recklessly, carelessly whether it be true or false. It is also clear that the defendants, their servant or agent made a general representation to *inter alia* the plaintiffs in their capacity as franchisees that the problem with the weights on the Parcel Line consignments would be looked into.

25. However, I am not satisfied on the balance of probabilities that it was intended by the defendants that the representation should be acted upon by the plaintiffs and that the plaintiffs did so act and suffer damage as a result because, quite clearly as a result of written communication and as a result of the plaintiffs own knowledge as regards the Parcel Line consignments, in effect both parties were aware that a proportion of the weights over 25kg were unreliable and that other franchisees were complaining about the weight situation and on occasion some declined to actually deliver Parcel Line consignments until the precise weights were established and agreement reached.

26. The memorandum to all depots as dated 23rd December, 2003, in my view clearly indicates against the known background circumstances at the time that all queries regarding Parcel Line weights should be brought to the attention of Ronan Gannon in Customer Services, and he "would authorise weight changes and assist where applicable and commission will be adjusted accordingly". The plaintiffs at all times knew that the weights were unreliable and that, in effect, all they had to do was to check the weights and phone in the correct weight and the appropriate commission would be paid. In these circumstances I am not satisfied to come to a conclusion that it was intended by the defendants that the representation as regards weight would be acted upon by the plaintiff and that the plaintiff did so on foot of the representation.

27. In my view the situation as between the plaintiffs and the defendants on this issue is somewhat clouded and I am not satisfied in

the particular circumstances on the balance of probabilities that fraud has been proved.

28. Arising from the claim in respect of the under weighing of Parcel Line consignments as indicated previously herein, the plaintiff is entitled to judgment as against the defendants in the sum of €31,900.00.

29. I turn now to the termination by the defendants of the plaintiffs franchise and the effect of Clause 13 in respect of the appropriate sum of money to be paid by the defendants to the plaintiffs pursuant to such termination.

30. The franchise agreement specifically provided at para. 2 thereof in relation to duration, that continuance would be until terminated by not less than six months written notice by either party expiring at the end of a calendar month and upon such notice being given by the owner, section 13 of the agreement governs the situation and provides:-

> "If notice is given by the owner under Clause 2 hereof, then the owner shall purchase or produce a purchaser of the business from the operator at a sum equal to the purchase price set out in the Schedule 3 hereto plus such further sum as is agreed between the parties which sum is to fairly reflect the turnover of the business carried on by the operator as of the date of the notice."

31. In the lifetime of the defendants operation it appears that termination by the defendants of a franchise agreement was extremely rare and, in effect, in all but one previous incidence what had occurred was that the franchisee sold on the franchise to a purchaser who was acceptable to the defendants, and in such circumstances it is common case that a price had to be agreed which was satisfactory to the franchisee and even though the purchase price was paid to the defendants they in turn, without deduction, forwarded the agreed purchase price as paid to them by the new franchisee to the retiring franchisee.

32. Insofar as I have to determine construction of the situation arising from Clause 13 of the agreement, as a general approach the court should conclude the intention of the parties from the natural and ordinary meaning of the words used. It is only in the case of ambiguity that a resort will be had to rules of construction or extrinsic evidence. In *LAC Minerals v. Shevron* (Unreported, High Court, 6th August, 1993) Keane J. explained the plain meaning rule in the following terms:-

> "If...a term of a contract is unambiguous and can only have one meaning the court cannot go beyond that unambiguous meaning so as to seek to interpret the intention of the parties."

33. Both parties hereto in their submission rely on the decision of the Supreme Court in *Analog Devices & Ors v. Zurich Insurance Company* [2005] 1 I.R. 274, wherein the principles of contractual interpretation set out in Lord Hoffinan's decision in *ICS v. West Bromwich Building Society* [1998] 1 W.L.R. 896 were adopted. These are as follows:-

> (1) Interpretation is the ascertainment of the meaning which the documents would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract.
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> (2) The background was famously referred to by Lord Wilberforce as the 'matrix of fact' but this phrase is, if anything, an understated description of what the background may include. Subject to the requirement that it should have been reasonably available to the parties and to the exception to be next mentioned, it includes absolutely anything which would have affected the way in which the language of the document would have been understood by a reasonable man.
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> (3) The law excludes from the admissible background the previous negotiations of the parties and their declarations of subjective intent. They are admissible only in an action for rectification. The law makes this distinction for reasons of practical policy and, in this respect only, legal interpretation differs from the way we would interpret utterances in ordinary life. The boundaries of this exception are in some respects unclear. But this is not the occasion on which to explore them.
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> (4) The meaning which a document (or any other utterance) would convey to a reasonable man is not the same thing as the meaning of its words. The meaning of words is a matter of dictionaries and grammar; the meaning of the document is what the parties using those words against the relevant background would reasonably have been understood to mean. The background may not merely enable the reasonable man to choose between the possible meaning of words which are ambiguous but even (as occasionally happens in ordinary life) to conclude that the parties must for whatever reason, have used the wrong words or syntax; see Mannai lid. v. Eagle Star Ass. Co. Ltd. [1997] A. C. 749.
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> (5) The 'rule' that words should be given their 'natural and ordinary meaning' reflects the commonsense proposition that we do not easily accept that people have made linguistic mistakes, particularly informal documents. On the other hand, if one would nevertheless conclude from the background that something must have gone wrong with the language, the law does not require judges to attribute to the parties an intention which they plainly could not have had. Lord Diplock made this point more vigorously when he said in Antaios Compania S.A. v. Salen A.B. [1985] A. C. 191, 201.:

34. In *Emo Oil Ltd v. Sun Alliance*, unreported 22nd January 2009, at page 13 Keams J. in giving the judgment of Supreme Court quoted with approval the following passage from Wilberforce L.J. in *Reardon Smith Line Limtied v. Young Hansen-Tangen* [1996] 3 ALL ER 570:-

> "No contracts are made in a vacuum: there is always a setting in which they have to be placed. The nature of what is legitimate to have regard to is usually described as 'the surrounding circumstances' but this phrase is imprecise.- it can be illustrated but hardly defined. In a commercial contract it is certainly right that the court should know the commercial purpose of the contract and this in turn presupposes a knowledge of the genesis of the transaction, the background, the context, the market in which the parties are operating ... When one speaks of the intention of the parties to the contract, one is speaking objectively- the parties cannot themselves give direct evidence of what their intention was - and what must be ascertained is what is to be taken as the intention which reasonable people would have had if placed in the situation of the parties. Similarly, when one is speaking of the aim, or objective, or commercial purpose, one is speaking objectively of what reasonable persons would have had in mind in the situation of the parties ... what the court must do must be to place itself in thought in the same factual matrix as that in which the parties were."

35. Kearns J. went on to approve the statement of Laffoy J. in *UPM Kymmene Corporation v. B.W.G.* Limited, unreported, 11 June 1999 that:

"The court's task is to ascertain the intention of the parties, and the intention must be ascertained from the language they have used, considered in light of the surrounding circumstances and the object of the contract".

36. These principles have been applied *BNY Trust Company Limtied v. Treasury Holdings* [2007] IEHC 271, Clarke J. and *McAleenan v. AIG Europe Ltd* [2010] IEHC 1, Finlay Geoghegan J.

37. It appears to follow that the correct approach is that the intention of the parties is to be derived from the plain meaning of the words used and in cases where ambiguity arises, the factual matrix approach appears to have displaced the traditional rules of construction. As is pointed out in McDermott "*Contract Law*" Butterworths, Dublin 2001, the proper approach is that the resort to the factual matrix will only be appropriate in cases when the intention of the parties is not clear from the words used in the contract.

38. The plaintiff contends that Clause 13 is properly constructed in the first instance by the payment of a sum equal to the purchase price set out in Schedule 3 plus such further sum based on the turnover of the business carried on by the plaintiffs as at the date of the notice, and that by taking the turnover as of date of purchase, the date of the notice, taking into account a number of other sales of franchises in which the defendants were involved as franchisor, one can take a figure of 47% of increased turnover in addition to the original purchase price and this is the methodology intended.

39. It is further contended on the defendants' behalf that the objective of Clause 13 will be achieved by paying the plaintiffs the sum that they originally paid uplifted to reflect the value of their business having regard to its turnover at the date of termination. That value can only be determined in the absence of agreement by use of a recognised valuation methodology. This is achieved by the application of an appropriate multiple to the profit earnings of the business. The earnings can be determined by deducting the costs of running the business with appropriate adjustments for potential savings from the turnover of the business and in that way the price will fairly reflect the turnover of the business.

40. The defendants further contend that the business could not realistically be valued on the basis solely of turnover because a business could have a substantial turnover but be making a loss, whereas an alternative business could have the same turnover and be making a substantial profit.

41. It has to be borne in mind that the consequences of a termination of the franchise from the perspective of the franchisee is extremely serious because, as in this case, the franchisee has expended considerable sums of money in advancing the franchise business in the particular area of operation, which in this case is Depot 28, and upon termination there is no compensation as such for all the material and equipment which has been purchased by the franchisee and which has gone into building up the business, which includes not only delivery of parcels which come from the defendants Athlone depot, but also the collection of parcels in the franchisee's area.

42. I take the view in construing Clause 13 that the plaintiffs are to be repaid a sum not less than the original purchase price, which in this case is sum of €95,000.00 and further, are to be paid a sum which fairly reflects the turnover and its effect on the value of the business which is to be paid by the defendants as owner having regard to the fact that it was not possible to procure a purchaser of the business.

43. It is quite clear in my view that the franchise agreement as entered into between the parties hereto was not made in a vacuum and the setting has been very fully outlined to the court in the evidence adduced. Section 13 of the contract has as its commercial purpose the agreement of a figure which represents the value of the franchise being terminated unilaterally by the franchise owner. The court has had extensive evidence relating to the genesis of the transaction, the background, and the context which the parties were operating, and in the particular circumstances I do not have a difficulty in placing the parties in the same factual matrix in which the parties were at the time and in my view the parties intention can be ascertained from the language they used given in the light of the surrounding circumstances and the object of s. 13 of the agreement. In my view it is not necessary to carry out an in depth analysis of the words as set out in Clause 13 and in my view the wording of the Clause makes business common sense.

44. Accordingly, in arriving at what I consider to be the appropriate valuation on the basis of the evidence adduced before the court, I propose to have regard to the turnover of the business as achieved at the date of the termination notice and to deduce therefrom, a fair figure which properly represents the profit of the business as at the date of the termination notice. I have given careful consideration to the extent of evidence adduced on the plaintiff's behalf in respect of comparative sales linked into a percentage of the actual turnover. Having regard to the evidence of Mr. O'Shea and the manner in which Mr. Grant originally approached a valuation of the plaintiff's franchise, I do not consider it appropriate to attempt to value the plaintiffs franchise on a basis of a percentage of turnover. The reality in my view and in this regard I accept Mr. O'Shea's evidence is that while clearly turnover is an essential feature, the commercial reality of turnover is to ascertain the profit that can be derived therefrom. I further have had regard to the fact that the plaintiffs were attempting to sell the franchise and had been unsuccessful in obtaining a purchaser thereof. I have likewise come to the conclusion that it would inappropriate to take this fact into account having regard to the specific wording and intent of Clause 13. Arriving at what I consider to be the appropriate valuation for the plaintiffs franchise as of the date of the notice of termination I am satisfied that the appropriate commercial method to be used is that as proposed by Mr. O'Shea in relation to a multiplication of the annual profits as achieved and in this particular situation taking into account the evidence of Mr. Grant I am of the view that the appropriate multiplier to be used is five times the annual profits as achieved. I further take the view that the appropriate years as accepted by Mr. O'Shea as the basis for the calculation are to be 2008 and 2009.

45. I accept the evidence effectively of both Mr. O'Shea and Mr. Grant that in deducing the appropriate level of profit as achieved by the franchisee a prospective purchaser would given close scrutiny to the various possible add backs that can be made to the profit by way of directors remuneration and by the variety of other add backs that could be considered such as those adduced in evidence by Mr. Cotter. However, in this regard I accept the evidence of Mr. O'Shea that one can only take one basis as an allowance for add backs and not both. I prefer the approach of Mr. Grant in respect of add backs to the effect that the appropriate approach relates to the area of directors' remuneration and that in Mr. Grant's opinion, the appropriate figure for add back to profit is a sum in the region of €50,000- €60,000. Mr. O'Shea in evidence took the view that while this figure may be portrayed as being radical such a figure could happen. Mr. Grant accepts that his estimate of €50,000 to €60,000 is not an exact figure and taking into the account the views as expressed by Mr. O'Shea I take the view that the appropriate figure for add back bearing in mind directors' remuneration for the years 2008/2009 is a figure of €50,000. Having regard to the 2008/2009 figures in respect of profit achieved an average figure for the two years is €18,655.

46. The retained figures for profit bar/loss before tax for 2008 and 2009 are both before tax. Thus it appears appropriate that in the overall calculation there should be firstly a deduction of 15% in respect of the profit element on the plaintiffs own business "Today Couriers" as conducted alongside that of the franchise and secondly, a deduction for tax at 12.5%. Allowing for the €50,000.00 sum by way of add back the profit margin is €68,655.00 less 15% reducing the figure to €58,356.00 and less a further 12.5% the figure

reduces to €51,061.00. Applying the five times multiplier it appears that the appropriate value of the plaintiffs franchise as of the date of the notice of termination was €255,307.00. This figure is nett of any liability to VAT which would have to be paid in addition thereto at the appropriate rate.

47. The two remaining items for determination are the plaintiffs claim for loss in respect of what is described as the IL4 account and the claim pursuant to the Pulsar account.

48. The claim, subject to liability pursuant to the IL4 account was agreed in the sum of €20,954.00 and Mr. Reaney in evidence took the view that six months notice would have been reasonable in the circumstances and thus, the claim in this regard is reduced to a figure of €6,984.66. The plaintiffs' complaint is that there was a very significant change to the commission payable in respect of this aspect of the business which came to the plaintiffs' attention by way of a letter of the 21st December, 2006, to take effect from the 1st January, 2007. At the time of the letter in December, 2006 the basic rate in respect of these transactions was €4.57 for the first kilogram and €0.08 for each subsequent kilogram. This was changed with effect from the 1st January, 2007, to the plaintiffs receiving €2.92 up to 25 kilograms and €0.06 for each kilogram thereafter.

49. However, the defendants say that this was, in effect, a price change which was brought about as a result of commercial expediency and that in the background there was always the possibility that the business could be lost unless new price structures were put in place with clients, and the defendants rely on Clause 18 of the franchise agreement which states as follows:-

> "The owner reserves the unconditional right from time to time to change the method or any part thereof including without limitation any forms, bulletins, procedures and standard agreements and the method as to change or amend it from time to time shall for all purposes be deemed to be the method referred to in this agreement provided that such changes shall be reasonable and shall be imposed upon the operator in a reasonable manner and over a reasonable period of time."

50. Clause 1.2 of the agreement defines "method" as follows:-

> "Method means a method of business operating carried on under the trade name or a substituted name in accordance with the regulations laid down from time to time by the owner, such regulations at the date hereof being those more particularly described in the first schedule hereto."

51. The plaintiffs submit that this was a dramatic change to such an extent that it actually was a change of method and required reasonable notice from the owner. The defendants contend that this was a necessary change brought about by price restructuring and that, in effect, if they were not entitled to enter into new pricing arrangements with their customers at short notice and if the franchise agreement is to be interpreted in the manner as proposed on the plaintiffs behalf, their ability to contract their business would be fettered as if they changed a price structure in order to retain a client they would be obliged to keep paying an additional price to their own franchisees.

52. I take the view that this was a price structure change brought about by commercial expediency and was not as such a change of method, and in the circumstances the plaintiffs claim in this regard fails.

53. The remaining claim is in respect of the Pulsar account. In this regard the figure of €8,680.00 has been agreed subject to liability.

54. I have the benefit of the evidence adduced on this aspect and I have carefully read and considered the correspondence that passed between the defendants and the plaintiffs. In my view the letter of the 7th March, 2008, from Martin O'Regan Sale Executive to the first named plaintiff, was quite clear in indicating that following the successful trial period the defendants would arrange for a trailer to be left on stand at Pulsar during the working day and collection would be nightly at 8.00pm to turn directly to the hub in Athlone, and that the plaintiffs would provide customer service support to Pulsar backed by HO customer services, and HO would service the CDS consumables requirements. There was no mention of any charge in respect of the articulated vehicle. In correspondence of the 13th June, 2008, with regard to the 40ft trailer, there was no indication that the trailer was to be sent to Pulsar at any charge to the plaintiffs. In a letter of the 10th April from the second named plaintiff to Martin O'Regan, while Ms. O'Regan expresses concerns there is still no indication of there being a charge for the 40ft trailer.

55. By way of a letter of the 3rd April, 2009, Mr. James Lohan Chief Financial Officer, indicated that as no agreement had been reached on specific terms as between the plaintiffs and the defendants in respect of commission payable on the Pulsar account, Mr. Lohan set out that he had no alternative but to deduct a trunking charge of €40 per day from the commission which amounted to €9,280.00 and covers the period 30th April, 2008, to 27th March, 2009, and further that he proposed to deduct this sum over the next three commission payments.

56. In reply on the 23rd April, 2009, the plaintiffs indicated that under absolutely no circumstances were they agreeable to this money being deducted and setting out that they were still awaiting a reply to earlier correspondence.

57. I do accept that the letter of the 17th September, 2008, set out that the defendants were proposing that the plaintiffs would have their full commission but would pay a nominal fee of €40 per day with the provision of the 40ft trailer, but these terms were never agreed to. I come to the conclusion that the imposition of the charge of €40 per day for the provision of the 40ft trailer was unilateral on the part of the defendants.

58. The position was made abundantly clear on the 14th May, 2009, as to what the situation was going forward, but I do not consider in the particular circumstances that up to that point the defendants were entitled simply to deduct the figure of €8,680.00 from the plaintiffs' commission up to and including the 22nd March, 2009.

59. Accordingly, in my view the plaintiffs are entitled to the return of the sum of €8,680.00 in respect of the Pulsar account.

60. The plaintiffs contend for interest to date on such sum as may be found to be due and owing to them. However, the franchise agreement and in particular Clause 13 thereof, does not contain any proviso in respect of the payment of interest and in the absence of any such stipulation, I take the view that interest is not payable to date but the judgment herein will attract Courts Act interest in normal course.