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Case No: 2009 FOLIO 1273

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
COMMERCIAL COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 06/05/2011

Before :

THE HONOURABLE MR JUSTICE FLAUX

- -

Between :

MMP GMBH (formerly ANTAL INTERNATIONAL NETWORK GMBH)	**Claimant**
- and -	
ANTAL INTERNATIONAL NETWORK LIMITED	**Defendant**

- -
- -

Rory Clarke (instructed by **Zimmers**) for the **Claimant**
Timothy Walker (instructed by **Wragge & Co LLP**) for the **Defendant**

Hearing dates: 14-17 March 2011

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Judgment

The Honourable Mr Justice Flaux:

Introduction and background

1. The claimant (to which I will refer as "MMP" to avoid confusion between the parties, although at the relevant time it was usually known as "Antal Kloten") is a company incorporated in Switzerland which carries on business as a recruitment consultancy. The managing director and sole shareholder is Mr Oscar Bosshard. In September 2003, MMP entered a Franchise Agreement with the defendant (to which I will refer as "Antal London") which is an established international recruitment agency. Under the Franchise Agreement, which was for a term of fifteen years, Antal London agreed to license MMP to use its business system, name and format in return for the payment of a one-off franchise fee of £25,000 and a monthly management fee (including a licence fee) of 12% of gross sales.

2. The Agreement operated for the best part of five years until June 2008, when Antal London received a complaint from a candidate of MMP, Lukas Baumann (who worked for a fund management company in Basel, Gutzwiller Fonds Management AG), about the conduct of Ann-Frances Bosshard, Mr Bosshard's daughter, who was at the time the only other employee (apart from Mr Bosshard himself) of MMP. She and Mr Baumann had had a relationship which had come to an end, but she had then

harassed him with text messages and phone calls day and night, to the point where she was telephoned by the Swiss police.

3. Antal London considered that Miss Bosshard's behaviour amounted to breach by MMP of a "substantial term" of the Franchise Agreement (clause 16.2(l)) which prohibits the franchisee from doing anything "to affect adversely [Antal London's] name, Trade Marks or other Intellectual Property". Clause 22.2(a) of the Franchise Agreement provided that Antal London could terminate the Franchise Agreement forthwith for breach of any substantial term of the Agreement. Accordingly, on 23 June 2008, Antal London gave notice by telephone to terminate the Franchise Agreement with immediate effect.

4. MMP's case is that Miss Bosshard's behaviour was not a breach by it of clause 16.2(l) of the Agreement or any other term and that the purported termination by Antal London was itself a repudiatory breach of the Franchise Agreement. The present proceedings were commenced in September 2009 claiming damages for repudiation by Antal London of the Franchise Agreement.

5. It is important to note at the outset of this judgment that it is not alleged by MMP that the termination of the Franchise Agreement caused the company to go into liquidation or to cease to trade permanently. Rather it was alleged by Mr Bosshard in his evidence that, after a hiatus of a few months when the company did not trade, it has since some time in late 2008 continued in business as a recruitment consultancy, albeit not, apparently, on a franchise basis. In those circumstances one would have expected damages to have been put forward as, in effect the loss of profits suffered by MMP as a consequence of the termination, that is the difference between the net profits which it is projected the company would have made as a franchisee for the remainder of the term of the Franchise Agreement and the net profits which the company has made and which it is projected it will make from running its recruitment consultancy during that period, albeit without the franchise.

6. Indeed, that is how Antal London contends in its Amended Defence that any loss should be measured. However, MMP has not put forward its damages claim on that basis. Rather it has relied upon a Valuation Report of Mr Urs Heller, a forensic accountant instructed by MMP, whose brief was to value the company at 20 June 2008. He has done so by using the Discounted Cash Flow ("DCF") method. MMP maintains in its pleadings that this is the appropriate method of measuring its loss, pleading at paragraph 9a. of the Amended Reply:

> "The Claimant maintains that the appropriate measure of loss is the value of the Claimant company with the franchise compared with its value without the franchise. The value of the Claimant company without the franchise was nil."

7. On the basis of Mr Heller's valuation report, MMP values the company at CHF 2,491,860 and that is therefore the loss it claims. As I have said, Antal London denies that this is the correct measure of loss but says that, even if it is the correct measure, on the basis of the evidence of its expert Mr Oliver Ambs, even with the franchise, MMP had no value at the date of termination.

8. At the outset of the trial, Mr Timothy Walker for Antal London drew my attention to the fact that there was this dispute on the pleadings as to the correct measure of loss. He made it clear that any attempt by MMP to put forward an alternative case on the basis of loss of profits would be strenuously resisted by Antal London. It had come prepared to meet MMP's pleaded case and no other and, apart from anything else, there had been little disclosure in relation to the business which the company had been conducting since June 2008 or the profits made, so that it would be fundamentally unfair to allow MMP to "change tack" now and plead or present an alternative claim on the basis of loss of profits. Mr Walker urged me, if I considered the basis upon which quantum was put forward as misconceived, not to adopt some half way house of awarding loss of profits.

9. In the event, no application was made by Mr Rory Clarke on behalf of MMP to amend its pleadings to plead an alternative claim for damages for loss of profits and, had such an application been made, I would not have allowed it without adjourning the case with an order for further disclosure in relation to the activities of the company since June 2008. Mr Clarke has maintained throughout that his client's claim for damages is on the basis of valuation by the DCF method and that that is the appropriate way of measuring the loss. It follows, as I made clear to Mr Clarke during closing submissions, that MMP's claim will stand or fall on that basis. In other words, if I conclude that valuation by the DCF method is not the appropriate method of measuring loss, the claim will fail and I would not be prepared to consider an alternative unpleaded and speculative claim for loss of profits merely because I concluded that that is how the claim should have been presented and that had it been so presented, MMP might have demonstrated that it had suffered some loss.

The issues

10. The issues which I have to determine are helpfully set out in the agreed List of Issues:

> 1 Breach of Contract
>
> a. Whether the subject of the complaint from Lucas Baumann was capable of adversely affecting "the name, Trade Marks or other Intellectual Property" of the Defendant within the meaning of Clause 16.2(1) of the Franchise Agreement
>
> b. Whether the subject of the complaint did have such an adverse effect.
>
> c. Whether the actions of Ann-Frances Bosshard which gave rise to the complaint can be attributed to the Claimant.

d. Whether the Claimant was in repudiatory breach of the Franchise Agreement by reason of the conduct of Ann-Frances Bosshard, due to a breach of Clause 16.2(1) or otherwise.

2. Quantum

a. The appropriate method of assessing the loss arising from the breach.

b. The historical earnings of the Claimant.

c. The likely future earnings of the Claimant if the franchise agreement had continued.

d. Whether those future earnings should include allowance for revenue from the Claimant granting sub-franchises.

11. For reasons which will become apparent later in the judgment, issue 2d does not really arise and so far as issue 2b is concerned, the historical earnings can be established from MMP's accounts and the monthly royalty reports submitted to Antal London.

12. The issues of breach of contract are in a narrow factual compass. They involve an examination of Miss Bosshard's behaviour, of what Antal London learned from Mr Baumann and of the steps taken to terminate the contract. In contrast, MMP's quantum claim necessarily involves an examination of some of the history of the company's business and performance during the course of the period of almost five years that it was a franchisee.

The terms of the Franchise Agreement

13. The Franchise Agreement had a start date of 1 September 2003 and an initial term of 15 years from that date. So far as relevant to the current dispute, the terms and conditions provided as follows:

"**Clause 1 Definitions**

"**Intellectual Property"** means any intellectual property belonging to us including, by way of illustration only, all rights in designs, forms, training and marketing materials, copyright

in software or the Operations Manual, the Trade Marks and unregistered trade marks we make available to you for use in the Business;

"**Premises**" means the premises named on the front of this Agreement [the office address of MMP in Kloten] or such other premises within the Territory as we may, from time to time, authorise for use in the operation of the Business;

"**Substantial Term**" means a term or condition of this Agreement in bold in this Agreement;

Clause 2 The Franchise

2.3 No exclusive territorial rights are granted to you. If we reasonably consider that you are not meeting the demand from Clients in the Territory, then we will notify you of this in writing and you will have the opportunity to make proposals to us as to how you will rectify the position. If within 30 days of the date of the notice you have not put forward proposals which we (acting reasonably) can accept and/or which will be implemented within a reasonable period of time then we may terminate this Agreement by notice or, at our discretion, reduce the area of the Territory, by such amount as is reasonable in all the circumstances.

Clause 3 Duration of this Agreement

3.1 This Agreement will begin when signed and dated by all parties and continue for the Initial Term, unless it is terminated or renewed in accordance with this Agreement.

Clause 4 Renewal of this Agreement

4.1 You are entitled to enter into a new franchise agreement with us at the end of the Initial Term for a further period of 15 years if:

(a) you have substantially fulfilled all your obligations under this Agreement during the Initial Term

(b) you have given at least 3 but not more than 6 months' written notice before the Expiry Date that you intend to enter into a new franchise agreement;

(c) you pay all our reasonable legal costs relating to your new franchise agreement when they are due for payment in accordance with relevant notice; and

(d) you pay to us no later than 1 week prior to the commencement of the renewal of the Initial term 10% of the then Franchise Fee.

Clause 5 Payment

5.1 The Franchise Fee together with any fees relating to the initial Training must be paid as soon as this Agreement is signed.

Clause 8 Intellectual Property, Trade Marks and Confidential Information

8.7 You must not apply to register any trade mark or create or use a website in your own or any other name for use in relation to the Business or register a company or form, any trading entity using any part of our name or the Trade Marks or anything similar to them without our consent.

Clause 16 Your other obligations

16.2 During the Term of this Agreement you must:

(k) not at any time, do anything to prejudice the operation or reputation of the Business, our business or any of our other franchise business;

(l) not at any time, do anything to affect adversely our name, Trade Marks or other Intellectual Property.

Clause 22 Termination of the Agreement

22.2 In addition to any of our other rights of termination under this Agreement we will have the right to terminate this Agreement immediately if any one of the following events happens, namely;

(a) you are in breach of a Substantial term;

(b) you are in breach of any term of the Trade Mark Licence**;**

22.3 We are entitled to terminate this Agreement by giving 30 days' written notice to you if there are persistent complaints from Clients concerning the quality of service provided or operation of the Business by you and, on full and proper

> investigation, we find those complaints to be justified unless, during that 30 day period, you can satisfy us that such complaints are unfair and/or unfounded. For the purpose of this paragraph "persistent" means an average of two complaints per Month for any period of 6 Months or more."

The terms of the Option Agreement

14. At the same time as entering the Franchise Agreement, on 1 September 2003, the parties also entered an Option Agreement, the terms of which, so far as relevant to the current dispute, are as follows:

> BACKGROUND
>
> D We have granted you a franchise and a licence to use our business system, name and format on terms and conditions set out in an agreement dated 1st September 2003 (the "Franchise Agreement"). You have expressed an interest in entering into a master licence agreement with us to open sites on similar terms to the Franchise Agreement in Austria, Switzerland and Liechtenstein ("the Master Licence Agreement").
>
> **Clause 1 Definitions**
>
> "**Trigger to Franchise**" means evidence, to our reasonable satisfaction, that the Business has operating profits of a minimum of €20,000 for 4 months out of any 6 month period;
>
> **Clause 2 Franchise Option**
>
> 2.1 In consideration of you entering into the Agreement we grant you:
>
> (a) the option for the Term to enter into a Master Licence Agreement in respect of Switzerland and Liechtenstein;
>
> (b) a further option to open offices in Austria within 12 Months of the First Trigger Date, provided that you will enter into a Master Licence Agreement for that country;
>
> 2.1 For the avoidance of doubt, if you exercise your options detailed in clause 2.1, the terms of any Master Licence Agreement will be determined between us and the development schedule in each Master Licence Agreement shall refer to the details contained in Schedule 1 as they refer to the relevant country.
>
> 2.2 If the First Trigger Date does not occur within 24 Months of the opening of the office in Switzerland in accordance with clause 2.1(a) we or our nominee may open an office in Austria and you will lose your option in respect of those countries.
>
> 2.3 Despite achieving the relevant First Trigger Date, should you fail to open an office in a particular country pursuant to clause 2.1(a) or 2.1(b), we or

our nominee may upon providing you with 90 days written notice, open 1 office in 1 of those countries in which you have failed to exercise your option and you will lose your option in respect of that relevant country. For the avoidance of doubt, the exercising of our rights under this clause, will in no way affect your pre-existing franchise rights to the country(ies) in which you have already opened an office.

2.4 This Agreement and your option to enter into a Master Franchising Agreement will automatically terminate upon expiry of the Term, unless you have complied with Clauses 2.1(a) and 2.1(b) above or as otherwise agreed in writing between us.

Issues of construction of the Agreements

15. As is apparent from the preamble to the Option Agreement, the circumstances in which it came about are that, from the very outset, Mr Bosshard was interested in having a Master Franchise Agreement (which would enable him to grant sub-franchises) in all three territories. Antal London was reluctant to permit this without having seen some proof of MMP's performance. Indeed it had a general reluctance to grant Master Franchises at all. It appears only one has ever been granted throughout the Antal network.

16. At all events, although the Option Agreement is not very clearly worded, its effect is tolerably clear. It gave MMP an option to enter a Master Franchise Agreement for Switzerland and Liechtenstein and, if that first option were taken up, a further option within the following twelve months to enter a Master Franchise Agreement in respect of Austria. If the first option were not exercised within 24 months of 1 September 2003, then the options would lapse. In each case, it was a trigger or condition to the exercise of the option that the operating profits of MMP were €20,000 in 4 months of any 6 month period prior to the exercise of the option.

17. I should deal immediately with two related issues of construction of the agreements. The first is whether the Franchise Agreement entitled MMP to open more than one office in the territories, an issue which has some bearing on the quantum of the claim, which assumes expansion of MMP's business in the years after 2008 if termination had not occurred. Despite Mr Clarke's argument, I am satisfied from the terms of the Franchise Agreement (and specifically the definition of "The Premises" and clause 2.3) that this is what the Antal London witnesses describe as a "single office agreement". In other words, MMP was entitled to operate the business from the office in Kloten identified in the Agreement and, although Antal London might have granted MMP permission to open further offices within the territories, it was under no obligation to do so.

18. Equally, as clause 2.3 made clear, MMP was granted no rights of exclusivity in the territories and under the terms of the Franchise Agreement it would have been open to Antal London to grant franchises to other firms of consultants in the territories or to open its own office or offices in the territories. Indeed there are many countries (including the UK) where Antal has more than one office, either franchised or run directly. It may be, reading the Franchise Agreement and the Option Agreement together, that it would not have been open to Antal London to open other offices in the territories until the 24 month period for exercise of the first option had passed, but this is a moot point, since the option was never exercised by 1 September 2005 or at all, so that Antal London was free to grant further franchises or open its own office in the territories at any time after 1 September 2005.

19. This brings me onto the second issue, concerning the granting of a Master Franchise Agreement. Although the valuation prepared by Mr Heller does not depend upon such an Agreement having been granted (which is why as I said earlier, issue 2d does not really arise), this was a matter on which Mr Bosshard felt strongly and expended much energy in his evidence. It can however be dealt with shortly since, as a matter of fact and as Mr Bosshard was eventually constrained to accept in evidence (despite some evasive and unimpressive bluster on the subject in cross-examination), no Master Franchise Agreement was ever signed by him or entered into between the parties. Furthermore, it is clear that in a telephone conversation with Liz Kilford of Antal London on or about 29 May 2008, Mr Bosshard accepted that he was not a master franchisee. In evidence, Mr Bosshard maintained that with goodwill, a Master Franchise Agreement would have been entered. That may or may not be the case, but as a matter of English law, that sort of general expectation gave MMP no rights, contractual or otherwise.

20. In the circumstances, the history of the matter can be dealt with shortly. In about August 2004, Mr Bosshard was in negotiation with a consultant called Peter Meinhardt, whom it was proposed would be a sub-franchisee of MMP. On 2 September 2004, Mr Kevin Cox then Managing Director of Antal London sent Mr Bosshard drafts of various standard agreements to cover this situation, including a draft Master Franchise Agreement. However, in the event, this was not signed by Mr Bosshard, let alone Antal London. It appears that this may have been because Mr Meinhardt was not prepared to agree the terms of the proposed sub-franchise agreement. Mr Bosshard asserted in evidence that Mr Meinhardt had agreed the terms orally, but I rather doubt that.

21. At all events, the relationship with Mr Meinhardt was not a success and he never was a sub-franchisee. Although he apparently worked on and off for MMP as a consultant from August 2004 to January 2006, he never paid a proportion of the office rent as he had originally undertaken to do and never earned any income for MMP. Equally he was never paid any salary by the company. His employment was terminated on 23 January 2006.

22. In August 2007, Mr Bosshard was in discussion with Joerg Grobli, whom it was also proposed that MMP would employ as a consultant with a view to his becoming a sub-franchisee. During correspondence which ensued between MMP and Antal London, Mr Bosshard took the line that there was a Master Franchise Agreement, whereas Antal London could find no record of one having been signed. Antal London senior management were reluctant to enter such an Agreement with Mr Bosshard as they

regarded him as difficult to deal with and as not fitting into the Antal Network "mould".

23. Mr Bosshard's position, exemplified by an email he sent on 21 March 2008 expressing surprise that he was no longer a Master Franchisee, is surprising and difficult to justify, since it is clear that he knew all along that no Master Franchise Agreement had in fact been agreed between the parties, whatever he had hoped would happen, which is of course why Antal London could find no trace of such an Agreement in its records. To the extent that he sought to maintain in cross-examination that he thought he was a master franchisee, that was as I have said, evasive bluster, which I do not accept.

24. Eventually, although there was some internal discussion within Antal London about making Mr Grobli a sub-franchisee of MMP on an ad hoc basis without a Master Franchise Agreement, Antal London, as it was entitled to do under the terms of the Agreements which had been signed (ie the Franchise Agreement and the Option Agreement), entered into a separate franchise arrangement directly with Mr Grobli.

The business and its performance

25. The Antal marketing material presented to would-be franchisees (including Mr Bosshard) at the induction stage contemplated, as one might expect, a start-up period for any new franchisee of between 6 and 12 months, after which, depending of course on the business acumen of the franchisee in question, the business might well become profitable and expand. However, as the disclaimer attached to that material made clear, the example given of how the business might expand and become more profitable is illustrative only and does not constitute any sort of representation as to what the particular franchisee might achieve, a point which is obvious anyway as a matter of common sense.

26. In the circumstances, it is surprising that MMP and its forensic accountant Mr Heller have used the illustrative figures from the marketing material as the basis for the projection as to how the business would have performed after 2008, had termination not occurred, which in turn is used as the basis for valuing MMP as at the date of termination. This is all the more surprising when one examines the performance of the company in the almost five years that the franchise operated between 1 September 2003 and 20 June 2008. Whether in terms of overall income from the franchise, net profits, number of employees and what they were paid, number of contracts procured or any other yardstick one might employ (matters I will examine in more detail in the ensuing paragraphs), the modest performance of this company over that period bears absolutely no relation to the illustrative example of an expanding and increasingly profitable recruitment consultancy set out in the marketing material. To the extent that past performance is a good indicator of likely future performance, the performance of this company over nearly five years of the franchise gives the complete lie to any suggestion that its future performance would have been successful in the way which the quantum of the claim postulates, a point to which I return in detail when addressing the issues of quantum below.

27. The income of the recruitment consultancy and the net profit or loss are set out in the accounts drawn up for each year by MMP's accountants Tureva Treuhand AG. Whether these accounts were ever audited remains unclear, but in broad terms with a

few exceptions the income is confirmed by the royalty reports made monthly by the company to Antal London. The picture which emerges is as follows. In the 4 month period from the start of the franchise to 31 December 2003, the income from the business was CHF46,799, but the company made a loss of CHF21,136. In the 12 months to 31 December 2004, the income from the business was CHF166,837 and the company made a profit of CHF21,869. For the 12 months to 31 December 2005, the income set out in the accounts is CHF323,094, but since the income figure in the royalty reports was lower, it looks as if that figure is overstated by some CHF42,000. Despite the fact that in terms of income 2005 seems to have been the best year MMP had during the franchise, the net profit was very modest, only CHF3,452.

28. For the 12 months to 31 December 2006, the income figure shown in the accounts was CHF147,648, although the figure shown by the royalty reports is the somewhat higher figure of CHF158,750. The net profit for the year was CHF10,765. For the 12 months to 31 December 2007, the income figure shown in the accounts was CHF284,469, somewhat higher than the income set out in the royalty reports of CHF261,130 and the net profit for the year was CHF15,784.

29. So far as 2008 is concerned, the actual accounts for that year do not give an accurate picture of income and net profit since they contain some "creative accounting" that excludes staff costs and depreciation. I agree with Mr Walker that a more accurate picture of the figures for 2008 emerges from the 2009 accounts: income of CHF218,445 and net profit of CHF25,621.

30. At first blush, therefore, the picture which emerges from the accounts is of a company which, after an initial loss to be expected during start-up, made modest profits each year, not profits on a scale which would suggest that the company would, if the franchise had continued, have expanded and generated profits at the level which the quantum of the claim assumes, but profits nonetheless. However, a closer examination of the accounts and the ledgers of the company reveals that the principal reason why the company appeared profitable was that the two fee earners who were with MMP throughout, namely Mr Bosshard and Miss Bosshard, were paid salaries which were very low, Miss Bosshard started working for the company in August 2004 and in the period to 31 December 2004 was paid CHF13,200, then CHF26,400 in 2005, CHF33,100 in 2006, CHF56,689 in 2007 and CHF40,039 in 2008. Mr Bosshard was not paid any salary at all other than in 2005 when he was paid CHF18,000. In some years he did draw money out of the company by way of shareholders' current account, although in other years he lent the company money. His assertion in evidence that overall he had invested CHF200,000 in the business was simply untrue. As Mr Walker demonstrated in cross-examination, the overall position by the end of 2008 was that he had received net CHF70,850 from the business.

31. The combined salaries which the Bosshards paid themselves during this period were less than the average earnings for one person in Zurich of about CHF80,000 per annum and were way below what a recruitment consultant in Switzerland would expect to be earning.

32. It appears from the ledgers that apart from a Mr Kuch who worked for the company between April and June 2004, the only other person who was employed by the company who was ever paid any salary was Sitta Fohr, who was employed as a recruitment consultant from about July 2005 until September 2006. She was paid

salary of CHF10,500 in 2005 and CHF25,500 in 2006. Again this salary bore no relation to what a recruitment consultant would expect to earn or to what the company would have had to pay staff if the expansion in subsequent years on which Mr Heller's quantum calculation is based were to have occurred. In fact, it would appear that the company had some difficulty in paying even that modest salary. In an email of 29 June 2005 to Mr Cox explaining that he could not afford to pay the final balance of the initial franchise fee (£7,000, by then outstanding for more than 18 months, a subject to which I return in more detail below) Mr Bosshard made the point that he would possibly have to make the new consultant (evidently a reference to Ms Fohr) redundant "in favour of other settlements".

33. I agree with Mr Walker that if the company had paid both the Bosshards (let alone Ms Fohr) salaries such as a recruitment consultant in Zurich might expect to earn, the company would have been loss-making in every year of the franchise. This was accepted by Mr Heller in cross-examination. It is all very well drawing reduced salaries during a period of start-up, but that period can hardly have lasted the best part of five years, or at least if it did, that is a pretty clear indication that the company was not in truth in a very healthy state at any stage between September 2003 and June 2008.

34. The extent to which the company was in financial difficulties is demonstrated by the inability or reluctance to pay all the initial franchise fee. Normally, the £25,000 franchise fee is payable to Antal London on entering the Franchise Agreement. Mr Bosshard negotiated with Mr Cox a variation of this whereby MMP would pay £6,250 on signing the Agreement on 3 September 2003, £6,250 on 22 September 2003 and the balance of £12,500 on 1 December 2003. However, only the first payment was made in September 2003 and the second tranche of £6,250 was paid late on 12 December 2003. In January 2004 Mr Bosshard agreed to pay 50% of the outstanding balance of £12,500 by the end of that month and 50% by the end of February. Those dates were put back to the end of February and the end of March but he still did not pay, saying on 20 April 2004 that he could not afford to pay then but as there was business in the pipeline, something should be available within 30 days.

35. In the event it was not until 13 July 2004 that he paid a further small amount of £2,500 and although MMP received CHF56,000 in income in August and September 2004 (as shown on the royalty reports), much to Antal London's annoyance none of this was used to pay the £10,000 outstanding. After further pressing from Antal London, another small amount of £2,000 was paid in November 2004. By the following April nothing further had been paid and Mr Paul Russell the chief financial officer of Antal London spoke to Mr Bosshard, who was evasive and cited investment problems in Switzerland and complaints about Bond Adept, the computer system provided by Antal as reasons for non-payment. Mr Bosshard remained evasive in his evidence about this, showing a marked reluctance to acknowledge that the conversation with Mr Russell had taken place at all, a matter on which Mr Russell was not challenged in cross-examination.

36. What emerges is further procrastination and when only £1,000 was paid on 20 April 2005, leaving £7,000 outstanding, Mr Cox wrote to Mr Bosshard in August 2005 giving him until 30 November 2005 to clear the entire balance and indicating that if it were not cleared Antal London might well serve a 30 day notice to terminate the

Franchise Agreement. Faced with the threat of termination, the balance was paid by the first half of November 2005, nearly two years after the balance was originally due.

37. Overall, it seems to me that this failure of Mr Bosshard to honour MMP's obligations to pay the initial franchise fee over a protracted period reflects badly on his credibility, as he recognised when giving evidence, as he sought to suggest that the failure to pay was in some way justified by the fact that he had had foisted upon him a computer system which did not work, an explanation which I found unconvincing. The fact that it took almost two years to pay off a modest sum is a further indication that MMP was not financially stable.

38. Throughout the period of the franchise, MMP seems to have had difficulty in securing the services of any recruitment consultant who was able to generate any income. Apart from Ms Fohr and Peter Meinhardt whom I have already mentioned, there was Jurg Zenger, with whom Mr Bosshard had planned to go into business at the outset of the franchise in 2003. However, that relationship did not work out and Mr Zenger neither paid anything towards the business nor generated any income. There was also a Norwegian contact of Mr Bosshard's, Klaus Fossum, actually described in MMP's 2004 literature as a "senior partner" although according to Mr Bosshard's evidence he was never an employee of MMP. His explanation was that he and Mr Fossum were looking to set up an Antal franchise in Norway, but when Mr Fossum saw an advertisement by Antal London for people in Norway, he thought he was being stabbed in the back and left. At all events, he does not seem to have generated any income for MMP.

39. A number of other names were mentioned over the years as potential employees. There was Kurt Fassler, a contact of Mr Zenger who was apparently working as a taxi driver and about whom Mr Bosshard was fairly disparaging, Nader Khedr and someone called Cornelia, but none of these people were ultimately employed.

40. At the time when Joerg Grobli was considering joining MMP, Mr Bosshard announced in an email of 31 August 2007 that, with effect from 1 September 2007, Ms Bosshard was moving up to be a partner of MMP and would be the single point of contact for Antal London when he was not around. He would step into the "second row" as he described it "while still being partly involved in the running of the company". In fact between about November 2007 and April 2008 Mr Bosshard was overseas and the day to day running of the business was in the hands of Ms Bosshard, as he said in terms in an email to Mr Gaiger, the contracts administrator of Antal London, on 1 February 2008.

41. Antal London clearly thought he was in South Africa, as evidenced by an email from Ms Kilford to Mr Bosshard of 10 April 2008 which begins: "I hope things are going well for you in South Africa!" In evidence, Mr Bosshard was surprisingly evasive and reticent as to whether he was in South Africa, although it is striking that, if he was not, he did not disabuse Ms Kilford of her impression. I consider that the reality is that during this period, he was almost certainly in South Africa or elsewhere in southern Africa, where historically he had conducted business. There is no evidence that whatever he was doing there was generating business for MMP and I agree with Mr Walker that he clearly had other interests outside the MMP business. By the time of termination, with Mr Grobli being established as a separate direct franchisee, the

business of MMP was essentially being run by Ms Bosshard, with limited involvement of Mr Bosshard.

42. As for the business which was generated, MMP entered into only three formal agreements with clients setting out the terms upon which candidates for employment would be introduced to the client and MMP would be paid fees accordingly, so-called EMEA Agreements because of the territorial area they covered. These were an agreement with Sybase GmbH dated 15 May 2006 (signed by Mr Bosshard but not signed by Sybase), an undated and unsigned agreement with Johnson Controls Europe made in about July 2007 and an agreement with Invista Resins and Fibers GmbH which was dated by Mr Bosshard, evidently initially with a date in July 2008, then changed to 15 June 2008. His evidence about this was not satisfactory, but at all events, even if that agreement was actually made (about which there is understandable doubt on Antal London's part), it was made just before the franchise was terminated and there is no evidence that it ever did or would have generated any business for MMP.

43. Indeed, under all three agreements, MMP managed only one placement, a deal for Sybase in February 2007 shared with Antal Italy. Mr Bosshard's approach to this and his interpretation of the EMEA Agreements with Sybase and Johnson Controls demonstrate the extent to which he was out of kilter with the Antal network philosophy. Neither agreement granted exclusivity to MMP; indeed the agreement with Sybase said in terms that it was non-exclusive. However, Mr Bosshard interpreted both as meaning that MMP would be the single point of contact for any Antal referral to Sybase or Johnson Controls and therefore that if any other Antal entity had a candidate for Sybase or Johnson Controls, that candidate would have to be referred by and through MMP which would then share the fee.

44. Mr Bosshard had initially not been prepared to share the Sybase referral with Antal Italy and on 13 June 2007, he sent an email to Mr Graeme Read, a director of Antal London asking for assurance that he would not be "outboxed" as he was by Antal Italy and that Antal Italy would not be able to deal direct with Sybase. In reply the same day Mr Read explained that a client would be able to deal with any Antal office and could not be restricted and that the rest of the Antal Network would not want to be locked out from contacting a client direct in a particular territory. Mr Bosshard's response was a disgruntled one: "Understood. Then I will think it over whether I should go into such cumbersome efforts in concluding an EMEA Agreement".

45. Notwithstanding Mr Read's instructions and Mr Bosshard's understanding of them (albeit reluctant), when the Agreement with Johnson Controls was made Mr Bosshard sent an email dated 7 August 2007 to the entire Antal Network stating "As there will be numerous vacancies of technical and administrative nature coming up over the next few months, it will be beneficial for Antal's overall reputation that no "cold calling" will be done." In other words, Mr Bosshard was trying to "lock out" other Antal entities and prevent them from contacting Johnson Controls in exactly the way Mr Read had told him he could not.

46. This clearly caused Mr Tony Goodwin, Chairman and CEO of Antal London at the time, considerable annoyance. He sent an email to the Network countermanding what Mr Bosshard had said, telling them not to stop saturation networking Johnson Controls. He responded to Mr Bosshard's email: "If you want to leave Antal please

do". Mr Bosshard indicated to Liz Kilford that he would be only too happy to leave if Mr Goodwin paid him £500,000 after a long legal battle.

47. The extent to which Mr Bosshard was not prepared to embrace the Antal philosophy and share deals and clients with other Antal entities is demonstrated by the fact that whereas on average 25% of the turnover of Antal entities is shared deals, MMP had only four shared trades during the whole franchise period of nearly five years: the Sybase deal already mentioned, Hewlett Packard in October 2004, two placements for GE Fleet in August/September 2005 and another placement for GE Fleet in January 2006.

48. Although there were good months when income was generated, what does not emerge from the royalty reports is either a consistent picture or an expanding, increasingly profitable business. For example although in the first five months of 2005, MMP earned some CHF160,000, that was followed by two months where no income at all was earned and then only CHF84,000 in the remaining five months of that year. In 2006, CHF70,500 was earned in the first three months, but that was followed by five months where there was no income at all.

49. Similarly, although CHF274,000 was earned in the first nine months of 2007 (albeit no income was made in January, March, May, June and August) after that there was no income earned for the rest of that year and apart from CHF60,000 earned in January 2008, no further income in February to May 2008.

50. In my judgment, throughout the period of the franchise, MMP was not in truth profitable and, had the Bosshards drawn salaries commensurate with what recruitment consultants in Switzerland would expect to earn, would have been loss-making throughout. It had difficulty recruiting consultants who were able to generate any income for the company. As Mr Walker submitted, recruitment is a "people business" and so the success of a recruitment consultant will depend upon how good he or she is at dealing with people. I am sorry to say that I did not form a favourable view of the "people skills" of either Bosshard. Whilst Ms Bosshard was at an obvious disadvantage in giving evidence, since she was having to talk about personal matters which clearly remained painful, she did not seem to me to have the sort of dynamic personality required to make a success of cold calling and building up a body of clients and candidates. Equally, although Mr Bosshard evidently has a great deal of experience in the recruitment business, the way in which he gave his evidence betrayed a somewhat angular and difficult personality and I suspect that his style would not appeal to a number of clients or candidates.

51. Mr Clarke cross-examined Mr Russell as to whether Mr Heller's assumptions as to what the expansion and profitability of the business would have been if the franchise had not been terminated were realistic or not. Mr Russell did not think they were and one of his principal reasons for that conclusion was that the past history of modest earnings over the period of the franchise did not warrant the assumption Mr Heller made that there would have been an exponential increase in the number of fee earners and billings.

52. Mr Russell said that a good consultant could earn billings of £200,000 a year. It is quite clear that neither Bosshard ever earned anything like that. Even in the best years, 2005 and 2007, their combined billings of around CHF280,000 were equivalent at the

then exchange rates of about 2.2 to 2.5 to about £110,000 to £130,000. Furthermore, Mr Russell said that he had looked at around the same time at purchasing a recruitment consultancy in Switzerland and its performance was far in excess of that of MMP. His conclusion was that the history of MMP's business was poor and although he was careful to be polite, he accepted in answer to me that what he really meant was that he did not think on past history that MMP was a very good consultancy, a view which I share.

53. Before turning to deal with the issues, I should just deal briefly with the position upon termination of the franchise. I deal in more detail below with the circumstances of the termination on 20 June 2008 and whether it was wrongful and for the present I am only concerned with the effect on the business. The evidence of both the Bosshards was that because one consequence of termination was that MMP was disconnected from the Antal intranet with immediate effect, they lost all their contacts and address book of clients or candidates and so were unable to carry on business as before, albeit without using the Antal name. Mr Walker challenged that evidence in cross-examination, suggesting that they had only been disconnected from the Antal email system and that they must have kept client records if not in hard copy, on a local computer server.

54. I was not entirely convinced by the evidence of the Bosshards that the only client records they had were on the Antal intranet, access to which was denied them after 20 June 2008, but I will assume in favour of MMP that its business was seriously disrupted by termination. There were formalities required by the Swiss equivalent of Companies House and by the Swiss tax authorities by way of re-registration which took a few months to sort out but, even on Mr Bosshard's evidence, the company was in a position to trade again as a recruitment consultant by October or November 2008.

55. Since that time, the company has continued in business as a recruitment consultant. I regarded the company and its witnesses, the Bosshards, as somewhat coy as to what business it has being doing and it is fair to say that the only direct evidence of its performance is in the 2009 accounts. These show income from the business for the year of CHF140,593 and a net loss of CHF15,200. There is no evidence as to performance in 2010 as the accounts for that year are not yet available. In his closing submissions, Mr Clarke on behalf of the company invited me to conclude that the value of the company without the franchise was nil, in other words that looking forward the company would never now make a profit in the future.

56. It seems to me that there are two problems with that submission. First, I agree with Mr Walker that it is essentially seeking to get through the back door a loss of profit claim which Mr Clarke had eschewed at the outset of the trial. As I indicated in the first section of this judgment, I am not prepared to permit any such loss of profit claim to be pursued as a fallback alternative if the claim on the basis of discounted cash flow fails. It is no use Mr Clarke submitting as he did that Mr Walker had not pursued any application for disclosure of documents relevant to the business carried on since June 2008 or cross-examined Mr Bosshard about that. In circumstances where Mr Clarke had indicated at the outset of the trial that he was not putting forward an alternative claim for loss of profits, it was not necessary for Mr Walker to pursue a disclosure application or to cross-examine Mr Bosshard about the business in fact undertaken since June 2008.

57. Second, the submission that the company will never make any profits in the future now that it has been deprived of the benefit of the Antal brand is a somewhat extreme one. As I have already noted, recruitment is a people business and, if Mr Bosshard (or for that matter Ms Bosshard) are as good at recruitment consulting as the quantum of the claim on the basis of discounted cash flow would have the Court believe, the idea that the business can never make a profit defies common sense. Even without the benefit of the Antal brand and the access to the Antal network, if they were good at the job they should be able to make the business profitable, as do other recruitment consultants in Switzerland who are not part of the Antal network, as Mr Heller accepted in cross-examination. The reality is that, if MMP has not been profitable since the franchise terminated and will not be profitable in the future, that is not because of the termination but because the Bosshards have not been able to establish a successful and profitable recruitment consultancy, with or without the franchise.

Liability Was MMP in breach of clause 16(l) of the franchise agreement?

58. The issues concerning breach of contract can be considered together. Miss Bosshard's evidence was that she met Mr Baumann and his business partner at a conference. They were looking for alternative employment and she agreed to help them. She said in her witness statement that this was on a friendly basis and that they were not officially registered with MMP. However it is clear that she had a copy of his CV and all his personal details and that she did try to find them both positions, even if unsuccessfully, so the attempt to argue that he was not to be regarded as a candidate or client of MMP is difficult to understand.

59. She and Mr Baumann then had a physical relationship which he ended after some months. She clearly did not want it to end. In her witness statement she says that she felt heartbroken and betrayed. She then began to bombard him with text messages. As she accepted in cross-examination, the records from Miss Bosshard's mobile phone show that in a period of some five weeks between 11 April 2008 and 18 May 2008, she sent some 800 texts to Mr Baumann's mobile phone, both during the day and at night. Even allowing for a fault on her phone which sometimes sent the same text twice or split a text up into several messages, it is clear that she deluged him with text messages. During some of that period he was in Australia. She would also ring him up and then hang up. She sent a letter to him care of his parents.

60. He complained to the Swiss police who telephoned Miss Bosshard, telling her that Mr Baumann was upset by her messages and wanted her to stop. For a while she did stop but then started texting him again. On 20 June 2008 Mr Baumann sent an email to Matthew Chapman, the revenue accountant at Antal London. Why the email was sent to Mr Chapman remains a mystery. It was in these terms:

> "I am looking for the CEO of Antal and the Managing Director of Antal Switzerland. Reason:
>
> An employee of Antal working in Kloten joined once an event of ours. Yes she has my CV which was for a special case of mine I logged it and met with her. I stopped the process because of different perspectives-mismatch to what I was after.

> Since I get more than 900 text messages. I ask her to stop it but with no success. Swisscom provided me with the signed statement of the person's mobile/blackberry no. The documents have been past on to the police department in Zurich. They contacted her and told her to stop it or they will open the case against her. For a week or two it was silent and now she has restarted with SMS, such as calls, ringing once and hanging up the phone (actually the police ask me-to have an extra talk to her after a while).I tried to contact Antal Kloten with no luck. I left message with Antal voicemail to return my call-no luck and it the same at the person's mobile no. with no luck.
>
> The only thing I ask is to stop this person to contact me. It is possibl[e] that she is doing it in private perspective which would make it even worse because she is sending letters to my parents as a fact she has all my details of my CV and is misusing my personal private data…"

61. Mr Chapman forwarded the email to Miss Sarah Jones, the operations director of Antal London who was responsible for dealing with any problems with the franchises. She telephoned Mr Baumann. During their conversation she made notes which helped her recollect the conversation when she came to give evidence. He told her he had met Miss Bosshard at an event he had organised in Zurich. They had met four or five times thereafter. He was looking to move to Sydney and she helped him with his job search.

62. When he ended their relationship, Miss Bosshard was evidently obsessed with him. He told Miss Jones that she had harassed him by contacting him repeatedly with over 1000 text messages day and night in a two month period as well as numerous emails to his office email address. This had caused him problems at work. He said that even the chairman of the fund management company he worked for had become involved and that word of his problem was spreading through the financial world.

63. He said that Ms Bosshard's conduct was a complete infringement of data protection. She was now also contacting him at his home address and his parents' address and he said that she had clearly got these details from his CV. He said that he had phone records showing the obsessive way she had been contacting him, which he subsequently sent to Miss Jones. He had contacted the police and prepared a file to send to them. They had spoken to Miss Bosshard but she had resumed sending texts to him, thirty in the last couple of days. He wanted to complain to Antal head office, describing Miss Bosshard's behaviour, as set out in Miss Jones' note as "a gross breach, unacceptable behaviour". He wanted Antal head office to know what was going on at Antal Switzerland and for someone to stop her. He emphasised that in his view Miss Bosshard's behaviour was an extremely poor reflection upon Antal. Miss Jones was sufficiently concerned that she asked Mr Baumann if he would be prepared to testify in court.

64. Miss Jones' evidence is that after this telephone conversation, she was very concerned. She says in her witness statement that it was obvious that Miss Bosshard's behaviour would have an impact on the Antal brand. When pressed in cross-examination, she admitted that this meant Antal's reputation. She then forwarded Mr

Baumann's email to Mr Doug Bugie, the CEO of Antal London who was in the United States and telephoned him to discuss the matter.

65. Mr Bugie's evidence in his witness statement is that after Miss Jones had reported in detail her conversation with Mr Baumann, he considered Miss Bosshard's actions "over the line of normal or acceptable professional behaviour". Knowing the Swiss market as he did, he was concerned that this could do real damage to the Antal brand, damage which could spread quickly and broadly. He felt that he had to move quickly to stop any possible damage. He instructed Miss Jones to contact MMP to terminate the franchise agreement immediately, which he considered Antal London was entitled to do under the substantial breach clause.

66. Miss Jones then prepared a note of what she was proposing to say to Miss Bosshard. That note referred to damage to the brand and immediate termination. It also said "no business" and Mr Clarke suggested to Miss Jones that this was a reference to the fact that an additional factor going into the balance in favour of termination was that MMP had not reported any fees in the royalty reports that year. Whilst she accepted that "no business" was referring to the absence of revenue from MMP that year, she was adamant that Antal London would not have terminated a franchisee just because they were not doing any business. At the end of the day, I am not sure any of that matters, for the simple reason that Miss Jones did not use her notes to speak to Miss Bosshard. When she and Liz Kilford telephoned MMP on the afternoon of 20 June 2008, Mr Bosshard answered the phone.

67. In his evidence, particularly his oral evidence in cross-examination, Mr Bugie was at great pains to justify the decision to terminate immediately on the basis that MMP was in breach of clause 16.2(l). He sought to emphasise that he had no way of knowing how far the story about Miss Bosshard and Mr Baumann had spread and the risk that other recruitment agencies would get to hear of it and turn it to their advantage, citing the example of the demise of Arthur Andersen as a consequence of Enron. He said, no doubt correctly, that it could have been highly damaging to the global Antal brand. When Mr Clarke put to him that what that really meant was damaging to Antal's reputation, he insisted that the incident had interfered with Antal London's "intellectual property" which included the Antal methodology, approach and training (in effect Antal's "goodwill") which was what built up the trust clients and candidates had in Antal and reinforced the brand.

68. What is clear nonetheless from the contemporaneous correspondence is that Mr Bugie saw this incident as an opportunity to get rid of MMP as an Antal franchisee and specifically to be "shot" of Mr Bosshard whom senior personnel in Antal London, including Mr Bugie, regarded as a "problem" and as not fitting into what might be described as the Antal mould. Thus, in an internal email later that day, 20 June 2008, to Mr Russell and Miss Jones amongst others, Mr Bugie said:

> "Look what we do with him. We're cutting him off, and I couldn't care less if he remains in the business doing nothing, as he as done before. We need to clean up the network and open great territories to better people, like we're doing in France and now Switzerland. I am thrilled we have gotten shot of Oscar and the ladies did very well to do it".

69. By the time he came to give evidence, Mr Bugie, who struck me as an engaging personality, albeit a fairly tough businessman, was clearly embarrassed by this email and it was no doubt this sense of embarrassment that led Mr Bugie to address the Bosshard family from the witness box to tell them that he had not wanted to hurt them personally. Be that as it may, it is clear from this email that, at the time, he was pleased to be shot of Mr Bosshard.

70. Furthermore, despite the vehemence with which Mr Bugie contended in his oral evidence that the incident had damaged Antal London's brand and even its intellectual property, it is clear that, at the time, he was less confident that Antal London was in fact entitled to terminate for breach of a substantial term. Thus, somewhat later, when Antal London was aware that litigation was likely to ensue, on 12 November 2008 in an email to Mr Goodwin and Mr Russell, Mr Bugie says: "we terminated him under specious grounds without warning".

71. At the end of the day, whether the termination was on a pretext or whether senior management in Antal London were glad to get rid of MMP and Mr Bosshard is not really relevant to the issue I have to decide, which is whether the circumstances of Miss Bosshard's behaviour did amount to a breach of clause 16.2(l). If there was such a breach, the fact that Antal London used it as a pretext to terminate or that they were delighted to be given such a pretext, is neither here nor there. On that hypothesis they were entitled to terminate. It is to that question of whether there was a breach of clause 16.2(l) which I now turn.

72. The first issue logically to be considered is issue 1c, whether the actions of Miss Bosshard are to be attributed to MMP. Mr Clarke submitted that Miss Bosshard was only an employee of MMP not a director, that the complaint related to her private life and that she was acting outside the course of her employment at a time when Mr Baumann was apparently not actively seeking employment through MMP as a recruitment agency. It seems to me that the answer to these submissions is the one Mr Walker gives. This was not Mr Baumann complaining about the private actions of a woman he had met but about the actions of the recruitment consultant he had engaged, on however informal a basis, who was misusing data from his CV. This would amount to a breach of her contract of employment and she would have no answer. In those circumstances, I agree with Mr Walker that it simply cannot be said that she was on a frolic of her own. Accordingly, her actions are to be attributed to MMP.

73. The central question is whether the actions of Miss Bosshard did "affect adversely our name, Trade Marks or other Intellectual Property". Antal London's pleaded case in the Amended Defence as regards breach of clause 16.2(l) is that the conduct of Miss Bosshard adversely affected Antal's "name" which appears to be synonymous with brand although the pleading does not spell that out. MMP's answer to that is a twofold one. First that "name" in clause 16.2(l) should be construed as meaning trade name in a narrow intellectual property sense, a construction which it seems to me is supported by the fact that clause 8.7 in the section of the franchise agreement dealing with intellectual Property refers to using "our name or the Trade Marks".

74. Second that "name" cannot be equivalent to reputation, as clause 16.2(k) (which is not a Substantial Term) deals with prejudicing the reputation of Antal London's business. MMP points out that Antal London's real complaint is of the potential

prejudice Miss Bosshard's conduct caused to its reputation. Although Antal London also relies on the conduct as constituting a breach of clause 16.2(k) (a matter to which I return below) MMP contends that any breach was not a repudiatory breach such as would have entitled Antal London to terminate forthwith on 20 June 2008, without giving MMP the opportunity to remedy any breach under clause 22.2(c).

75. In his closing submissions, Mr Walker submitted first that "name" in clause 16.2(l) cannot simply be limited to the name "Antal" in a narrow sense because the name "Antal" is also a trade mark and this would mean that the reference to "name" was tautologous. Second, he submits that "name" imports the whole Antal brand, reputation and goodwill, all of which are part of the intellectual property of Antal London. In answer to the point made by Mr Clarke that this construction would mean that damage to reputation was covered by both (k) and (l), which would be illogical because only (l) is a substantial term, Mr Walker submits that (k) is really dealing with operational matters and the extent to which poor performance of the franchise agreement prejudices the operation or reputation of the business. Such breaches are remediable, as demonstrated by clauses 2.3 and 22.3. In contrast (l) is dealing with adverse effect on intellectual property, which includes the brand, which is not remediable, which is why it is a substantial term.

76. The definition of Intellectual Property in the franchise agreement refers to various matters "by way of illustration only" including "all rights in ...training and marketing materials". Although this does not refer in terms to either the Antal brand or the goodwill that brand generates, I am prepared to accept that both brand and goodwill fall within "name" and/or Intellectual Property within the meaning of clause 16.2(l) so that actions which adversely affect the brand or the goodwill of Antal London would be in breach of that provision. To that extent, I accept Mr Walker's submissions as to the distinction to be drawn between clause 16.2(k) and 16.2(l).

77. However, as I see it, the real problem Antal London faces is whether, on the facts, the actions of Miss Bosshard did "affect adversely" the name or Intellectual Property of Antal London. I accept Mr Bugie's evidence that he feared that Miss Bosshard's conduct would damage the Antal brand, but as he was constrained to accept in cross-examination, he had no evidence he could put forward that her conduct had in fact damaged the brand. In my judgment, upon the true construction of clause 16.2(l) a fortiori given that it is a substantial term breach of which entitles Antal London to terminate immediately, a fear or concern that MMP's conduct may damage the brand is not sufficient to constitute a breach of the clause. There must be evidence that the conduct has in fact adversely affected the brand, evidence which is distinctly lacking in this case.

78. It follows in my judgment that, although Mr Walker is right as to the true construction of the clause, Antal London cannot establish a breach of the clause on the facts. So far as the alternative case under 16.2(k) is concerned, in my judgment there are two answers to that case. The first is that for the same reason that Antal London cannot show that Miss Bosshard's conduct in fact adversely affected the brand, it cannot show that her conduct in fact prejudiced the operation or reputation of Antal London.

79. The second answer is that the allegation of breach of clause 16.2(k) could only avail Antal London to the extent that it could demonstrate that the particular breach was repudiatory entitling it to terminate on 20 June 2008, otherwise it was obliged to

afford MMP the opportunity of remedying the breach under clause 22.2(c). Where, as here, Antal London cannot demonstrate any actual prejudice to the operation or reputation of its business, it seems to me that, even if there was otherwise a breach of clause 16.2(k), which on this hypothesis is doubtful, it is totally hopeless to suggest that the breach was so serious as to go to the root of the contract, the well-established test for whether a breach is repudiatory.

80. Accordingly, Antal London was not entitled to use Miss Bosshard's conduct as a ground for immediate termination of the franchise agreement on 20 June 2008 and its purported termination on that date was wrongful and a renunciatory breach of the franchise agreement.

Quantum: the appropriate method of assessing the loss arising from the breach

81. The measure of damages in a case of breach of contract is the amount required to place the claimant in the position that it would have been in if the contract had not been broken. In the present case, the breach of contract which I have found was committed by Antal London had the effect of depriving MMP of the franchise, but did not have the effect of closing its business down or of causing Mr Bosshard to sell the business. The company has continued to trade as a recruitment consultancy, albeit without the franchise. In such circumstances, as a matter of first principle, placing the company in the position it would have been in if the contract had not been broken requires the Court to assess whether the net income of the company without the franchise has been and will be less than what the net income would have been had the Franchise Agreement continued for the rest of its duration. In other words, in shorthand, the measure of damages is the loss of profits suffered as a consequence of the breach.

82. If that assessment demonstrated that the net income is and will be less than it would have been if the Franchise Agreement had not been repudiated by Antal London, the amount of that diminution in income (or loss of profits) would be the measure of damages awarded, subject to an appropriate discount for early receipt of money. Equally, if that assessment failed to demonstrate any diminution in income (because for example the company had continued or was expected to continue to be as profitable without the franchise as it had been with the franchise) or demonstrated that with or without the franchise the business would have been loss making, the company would not establish any loss of profits and the damages awarded would be nominal.

83. If the effect of the breach of contract had been to put the company out of business then since, by definition, there are no future profits (or losses) against which to compare the profits (or losses) which the company would have made had the breach not occurred, then it is not possible for the Court to assess damages on the basis of loss of profits in the normal way. It seems to me that it is only in such situations that the Court will fall back on what Mr Clarke in his closing submissions described as a "proxy for... loss of profits" of seeking to value the company as at the date of the breach, both because it is that value of which the claimant has been deprived by the breach and because it is only by such valuation that the Court can arrive at a "proxy" for the loss of profits. However where it is possible to assess the loss of profits in the normal way, that should be the measure of damages.

84. Somewhat surprisingly there is little authority which bears directly on the issue raised by MMP's approach to quantum in this case, but Mr Walker referred me to the decision of the Court of Appeal in **Crehan v Inntrepreneur Pub Co CPC** [2004] EWCA Civ 637. In that case, the claimant took the leases of two pubs which were owned by landlords and were so-called "tied" pubs. He was unable to run them successfully and after about two years surrendered both leases. The owners sued him and in his defence he alleged (as it turned out successfully) that the tie was contrary to European law and counterclaimed damages alleging that it was the tie which caused the business to fail. He claimed loss of profits not just for the period when he operated the two pubs (during which period he alleged the profits were reduced by reason of the tie) but also for what would have been the full duration of the leases after their surrender, a further ten years. He also claimed the capital value of the leases at the end of the ten year period if they had been free of the tie throughout.

85. At first instance Park J awarded the claimant some £57,000 loss of profits for the period of two years until the surrender of the leases in 1993 (a head of damage not challenged on appeal). He then awarded loss of profits of £889,000 for the ten years remaining on the leases from 1993 to 2003. That figure discounted the damages awarded by 15% to reflect uncertainties over that period. The learned judge also awarded damages of £361,500 in respect of the value of the leases in 2003 if free of tie throughout.

86. The Court of Appeal rejected that approach of awarding future loss of profits and an assessment of value at the end of what would have been the full period of the leases. In paragraph 178 of the judgment of the Court (Peter Gibson and Tuckey LJJ and Sir Martin Nourse) they identify the problem with Park J's approach as being that "[it] faces the court with the immediate difficulty that the measure of damages involves a hypothesis upon a hypothesis: the hypothetical profits of a hypothetical business". The Court of Appeal concluded that the correct measure of damages as regards the future was the value of the leases as at the date of surrender in 1993 on the basis they had been free from tie throughout (see paragraphs 179 and 180 of the judgment).

87. In reaching that conclusion the Court of Appeal adopted and approved the approach of HH Judge Raymond Jack QC (as he then was) in **UYB v British Railways Board** (1999) (unreported). In that case the claimant wanted to set up a night club in two arches owned by the defendant near Bristol Temple Meads station and entered a tenancy agreement with the defendant. Conversion work was in progress but had to stop because of the ingress of a vast quantity of water. The night club was never opened and the project was effectively abandoned in November 1993. The defendant accepted liability for breach of contract and tort and the issue for the learned judge was the correct quantum of damages.

88. The claimant claimed loss of profits in excess of £12 million for a period of 25 years on the basis that although the tenancy agreement was a yearly one the defendant had previously indicated a willingness to enter into a 25 year lease. The learned judge rejected that approach, concluding that the loss was to be measured first by an assessment of the profits lost between the date when the premises would have opened in October 1992 had there been no water problem and the date when the project was abandoned in November 1993 and second by an assessment of the value of the hypothetical business in November 1993. An appeal to the Court of Appeal was dismissed.

89. Although neither of these cases is directly in point, in the sense that they are concerned with what might be described as the obverse of the situation I have to consider, in other words they are concerned with the inappropriateness of awarding damages on the basis of hypothetical loss of profits as opposed to a valuation of the business as at the date of breach or the date when the business "ceased" as a consequence of breach (in the **UYB** case the date when the project was finally abandoned and in **Crehan** the date when the leases were surrendered). However, both cases recognise that until the date when the business ceased it would be appropriate to award loss of profits and to that extent it seems to me that they are recognising implicitly that, except where the business has ceased as a consequence of the breach, loss of profits is the appropriate measure of damages.

90. Certainly nothing in either case supports the proposition, upon which MMP's approach in the present case depends, that where, despite the breach, the business continues, a valuation of the business as if it were being sold as at the date of breach is the appropriate measure of damages. In my judgment MMP's approach is open to two fundamental objections. First, an assessment of damages on the basis of a valuation of the company as at the date of breach is essentially, as in **Crehan**, a hypothesis upon a hypothesis, the hypothetical value of the company as at 20 June 2008 on the hypothesis that it had ceased doing business on that date.

91. Second, that approach fails to take account of the fact that despite the breach, the company is continuing to do business and thus has the potential to be profitable in the future during the period when but for the breach the franchise would have continued and thus fails to give credit against any damages for the profits which the company will make in any event. In contrast, a claim based on the assessment of what loss of profits was caused by the breach would take proper account of the likely profits the company will make despite the breach. In a very real sense, Mr Clarke's attempt in his closing submissions to suggest that the Court should assume that the company would make no profits at all in the future without the franchise recognised the need to assess damages for an on-going business by reference to the profits actually lost.

92. However, the problem, as I have said, is that because the quantum has never been presented on the appropriate basis of assessing profits lost and disclosure has not been given on that basis, it is impossible for the Court to assess in a manner fair to both parties what the loss of profits as a consequence of the breach of contract was. As I said at the beginning of this judgment and as Mr Clarke and his clients were warned more than once, their case would stand or fall on whether valuation of the business at the date of breach was the correct measure of damages and there was no scope for substituting some alternative measure of loss of profits. Because I have concluded that the discounted cash flow valuation is not the correct measure of damages, it necessarily follows that MMP has not established that it has suffered any loss as a consequence of the repudiatory breach of the contract and that at most it is entitled to nominal damages.

Quantum: Historical and likely future earnings of MMP

93. These two sub-issues can be considered together and are essentially concerned with how realistic the quantum of claim actually put forward is. Even if I had concluded that the discounted cash flow valuation was the correct measure of damages, I still

consider that the quantum of damages based upon Mr Heller's valuation is hopelessly speculative and over-inflated for three principal reasons.

94. First, in cross-examination Mr Heller stated that his valuation exercise had been carried out to put a value on the business, looking forward to what Mr Bosshard could have achieved, and had not been carried out to put a price on what someone would pay for the company. He accepted that any purchaser would conduct a due diligence exercise and in particular would look very carefully at the past performance and trading history of the company to assess likely future performance. It was quite clear that Mr Heller had not conducted anything which could even begin to be described as a due diligence exercise himself. Apart from the accounts of the company for 2005 to 2008 (from which he derived the "Fees/Billings" figures for past years) the sources of information referred to in his report turned out to be either documents prepared by Mr Bosshard or the fruits of discussions with Mr Bosshard in which Mr Bosshard made assertions as to what he could have achieved in the future.

95. Thus what Mr Heller described in his report as "projects in the pipeline and historical data" turned out to be a self-serving document prepared by Mr Bosshard headed "Compensation Calculation". No attempt was made by Mr Heller at the time or in his evidence to verify that calculation. Similarly, in his report he said that the revenues were estimated in line with the recruitment material from Antal London (i.e. the illustrative marketing material to which I referred earlier) and Mr Bosshard's "business plan". It emerged that this business plan was no more than Mr Bosshard looking at the "Profit and Loss Analysis for the First 24 Months of the Business" set out in the marketing material and telling Mr Heller that he could have achieved this and that he intended to end up with 10 to 15 consultants. Again no attempt was apparently made by Mr Heller to verify to what extent any of the oral assertions by Mr Bosshard were realistic.

96. Merely by way of example, had Mr Heller sought to verify critically Mr Bosshard's intention to end up with a substantial number of consultants he would have been bound to find out that during the whole period of the franchise of almost five years, Mr Bosshard had failed to recruit any good consultants capable of generating income for the company. This would surely have indicated that Mr Bosshard's intention was no more than a pipe dream. It is no answer to say that Mr Heller's valuation based on that business plan was conservative because his projected incomes were based on three consultants being employed in 2009, rising to seven in the years thereafter. Nothing in the past performance suggested that the company was capable of sustaining seven consultants and it had not employed three since Sitta Fohr was made redundant in September 2006.

97. In fact, in cross-examination Mr Heller accepted that looking at the figures from the 2005 to 2008 accounts set out in his valuation calculation, you could say that the franchise business operated by Mr Bosshard was not very successful. As I have indicated earlier in the judgment, that is all the more the case if one looks critically at the modest profit figures in the accounts and bears in mind that the salary figures even for the limited number of employees are all artificially low, less than the average salary in Zurich of CHF80,000 and way below what a recruitment consultant in Switzerland would expect to earn. Had Mr and Ms Bosshard and Ms Fohr been paid the going rate, the company would have been loss making year on year. Mr Heller accepted this in cross-examination and, in any event, it is demonstrated by his own

table setting out his valuation. If one deducts from the net profits he has derived from the accounts for 2005 to 2008 his figure of CHF120,000 for "owner's salary", the business is loss making in every year.

98. In my judgment, any prospective purchaser of this business who had conducted a due diligence exercise would have been unlikely to be prepared to pay any money for it. In terms of valuation, it follows that I prefer Mr Ambs' evidence to that of Mr Heller. The reality is that as Mr Walker submitted and as Mr Heller was inclined to accept in cross-examination, someone who wanted to become a franchisee of Antal London would simply have paid the franchise fee of £25,000 to set up his own business rather than pay anything for MMP.

99. Second, as I have already said, in his table setting out his valuation Mr Heller has used the model of the illustrative profit and loss figures from the Antal London marketing material for his projections for 2009 to 2013. However, as Mr Russell said in his evidence, the illustrative figures are part of a sales document and only indicate what a good consultant could end up achieving. They are also figures projected from the outset of a franchise, not an indication of what might be achieved by a franchisee who has already been operating the franchise for the best part of five years without success.

100. Mr Heller suggested that maybe it had taken Mr Bosshard longer to learn the Antal system than the marketing material suggested, since the material assumed a start up phase of six months to a year, not the best part of five years. Mr Heller went on to say that he believed that Mr Bosshard would change for the future and had a chance to be very successful, but there is simply no objective basis for that blind faith in Mr Bosshard. The conduct of Mr Bosshard in the period before termination (such as the attempt to lock out other Antal franchisees from dealing with "his" clients and the feigned surprise that it was being suggested that there was no Master Franchise Agreement) suggests that he was at odds with the Antal philosophy and is not indicative of any willingness or ability to change. The reality is that the past performance suggested that neither Mr Bosshard nor those he employed were good consultants and there is no justification for the assumption that that was going to change for the future.

101. Third, the unreality of the valuation exercise in which Mr Heller has engaged is easily demonstrated by comparing the position in 2008 with the projected position in 2009. This assumes a fivefold increase in fees between 2008 and 2009. Mr Walker put to Mr Heller that this was fanciful and Mr Heller said it was what he described as a "sporty projection" or "optimistic". Even taking that evidence at face value, it seems to me fatal to any suggestion that MMP can establish on a balance of probabilities that this valuation represents the loss it has suffered.

102. In re-examination Mr Heller sought to suggest that if it took longer than one year to ramp up in that way, then all that would mean is that you would lose a year. However, in my judgment the fallacy in all of this is what Mr Walker correctly described as the "fanciful" suggestion that at any stage after the best part of five years running this franchise without success, Mr Bosshard could have turned matters around, so that (whether in 2009 or later years) MMP could have earned five or ten times what it had in 2008. All this depends upon new consultants being employed who from a standing start in 2009 could earn something in the region of CHF300,000 each in that year

alone, with a similar influx of a further four consultants the following year also each earning that much from the outset. Given the past inability to recruit consultants who could generate income, the assumptions on which these projections by Mr Heller are based are indeed fanciful.

103. I consider that the suggestion that this business could ever have been turned around from the loss-making position it was in up until 2008, to make profits of the kind put forward by Mr Heller in his valuation, is wholly speculative and unrealistic.

104. Mr Clarke suggested in closing submissions that if I considered Mr Heller's projections over-optimistic, I could use the table setting out his valuation and adjust all the figures downwards or increase the rate of discount, producing a more modest level of quantum. Mr Walker urged me not to adopt that approach, submitting that as MMP had chosen to put forward its claim on the basis of Mr Heller's valuation if, as I have, I concluded that that valuation was speculative and unrealistic, the claim must fail. It seems to me that Mr Walker is right. MMP has simply not produced any evidence, expert or otherwise, to justify a different set of projections and assumptions.

105. The position here is very similar to that in **Automotive Latch Systems v Honeywell International Inc** [2008] EWHC 2171 (Comm) (to which I referred Mr Clarke in closing submissions): see paragraphs 811 and 812 of my judgment in that case. That was a "loss of a chance" case whereas this case has not been presented on that basis, but that can make no difference to the analysis. Even if this case had been presented on a "loss of a chance" basis, I would have concluded the relevant probability based upon Mr Heller's valuation as wholly speculative.

106. It follows that even if valuation on a discounted cash flow basis were the correct measure of damages, this claim must fail.