Neutral Citation Number: [2025] EWHC 2096 (KB)

Case No: KB-2021-000741

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 06/08/2025

Before :

MR JUSTICE FREEDMAN

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Between :

(1) STEVEN ELLIS
(2) STEPHEN HAYWARD
(3) WAYNE MONK
(4) KEVIN PATTERSON
(5) ADRIAN ROBINS
(6) JANINE RUSTED
(7) JOHN STUBBINGS
(8) SUSANNA SUMMERS
(9) ROBERT SZATKOWSKI
(10 ADAM CHAPMAN
(11) AMANDA CHERRY
(12) TOMASZ DZIERZANOWSKI
(13) MICHELE GEORGE
(14) PATRICK MACKINTOSH
(15) PAUL MAPLES
(16) JOANNE NEWMAN
(17) HELEN PATMORE
(18) ANDREW TANFIELD
(19) SINEAD THORNTON
(20 CLAIRE FREEMAN

Claimants

- and –

JOHN BENSON LIMITED

Defendant

and

various additional parties against whom the claim is stayed

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Mark Stephens (instructed by **Aquabridge Law**) for the **First to Third, Fifth to Thirteenth, Fifteenth, Sixteenth, Eighteenth to Twentieth Claimants**
The Fourth, Fourteenth and Seventeenth Claimants were not represented and did not appear
Andrew Butler KC and Annie Higgo (instructed by **Holmes & Hills LLP**) for the **Defendant**

Hearing dates: 6, 7, 13, 14, 17, 18, 19, 20, 21, 24, 25, 26, 27, 28 March and 3 & 4 April 2025
Further written submissions: 17 and 22 April 2025.

Judgment distributed in draft: 28 July 2025

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Approved Judgment

This judgment was handed down remotely at 10.30am on Wednesday 6 August 2025 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

MR JUSTICE FREEDMAN:

I Introduction

1. This is a dispute between the Defendant, a driving school ("JBL"), and the Claimants, twenty driving instructors, who were former franchisees of JBL. The case raises an issue as to whether the franchise relationship was based on expectations of trust and confidence going beyond an ordinary commercial relationship under which the parties owed a duty to conduct themselves in good faith and to deal fairly with one another. It was the case of the Claimants among other things that JBL's managing director Mr. John Benson created an abusive and intimidating environment in which each of the claimants found it intolerable to continue to work for JBL. It is their case that JBL was in breach of each of the franchise agreements in the way in which each of the franchisees respectively were treated by JBL.

2. In late 2020, each of the Claimants terminated their contracts with JBL alleging that they were entitled to do so because of breaches of those implied terms. JBL denies that the contracts were subject to the implied terms alleged and denies breaches in any event. It contends that the Claimants had no right to terminate their contracts with JBL and that their terminations amounted to repudiatory breaches giving rise to counterclaims in damages.

3. The battleground is therefore that the Claimants seek declarations that their terminations were lawful and that they are discharged from their franchise agreements with JBL. JBL says that the terminations were unlawful and themselves amounted to breaches of contract. It counterclaims damages under contract or at common law comprising *"the sum which would have been payable by way of franchise fees and other charges had the agreement not been terminated as a consequence of your breach."* It is this which explains the very large sums counterclaimed against the franchisees in many cases several tens of thousands of pounds, in some cases over £100,000 and in one case, more or less than £300,000 (depending on how the damages were calculated).

II The preliminary issues

4. A trial of preliminary issues has been ordered. Although agreed to be tried as such, they are issues which go to the heart of liability in this case. The issues have been amended, with the agreement of the Court, and are as follows:

    (1) were the contracts entered into between the Claimants and the Defendant contracts under which the parties owed a duty to conduct themselves in good faith and to deal fairly with one another?

    (2) were express or implied terms of those contracts breached, and if so by whom?

    (3) were the contracts, or any of them, lawfully discharged, and if so by whom?

5. It had been the case in respect of the first issue that the contracts were described as "relational contracts", but since that is a potentially problematic formulation, the expression has been omitted entirely from the first issue. This followed, in particular, the concern of Fancourt J in *UTB LLC v Sheffield United Ltd.* [2019] EWHC 2322 (Ch) at para. 202, namely that "*There is a danger in using the term "relational contract" that one is not clear about what exactly is meant by it*."

6. There was a suggestion at trial on the part of the Defendant that the Court could decide the contractual question, being the first of the above issues. It was submitted that the Court could decide this as a matter of law without having to hear the evidence of all the complaints of the franchisees. The Court refused to take the course. The reasons were as follows:

   (1) the Court would need to hear about the factual matrix against which the contracts were entered into, and each contract needs to be considered separately. The scope of the evidence may be different in the event that the implied terms contended for were implied in fact rather than implied terms in law. To the extent that they were contended to be implied terms in fact, a significant part of the witness evidence would still be required;

   (2) if the Court ruled that no duty arose, but an appeal followed where the appeal court took a different view, the Court was concerned that the case would then be remitted for the second and third issues to be determined. It would be undesirable for that to occur at that stage when the parties were prepared for the oral evidence to be given at this stage.

7. For these reasons, rather than have a belated short cut which might be regretted, it seemed better to take the course always intended of trying all three preliminary issues.

III The parties

8. It is convenient to refer first to the Defendant, JBL, the franchisor and then to the Claimants, the franchisees.

9. JBL was incorporated in 2004. It trades as the Benson School of Motoring. Before then, Mr. John Benson had been a driving instructor with the British School of Motoring. In about 1993, he left to form the Benson School of Motoring which he operated at first as a sole trader. The Benson School of Motoring is said to be the largest independently owned driving school in East Anglia having over 100 franchisees. Almost all of the franchisees operate under franchise agreements with JBL.

10. The franchisees are driving instructors. Typically, they had no prior experience of being driving instructors or of trading on their own account. Their first franchise agreement provides for a period of training which is in various stages, after which they take on customers of their own. Most of the franchisees who gave evidence had limited academic qualifications usually confined to some examinations at school, most at GCSE/GCE O level and some had NVQ's, national vocational qualifications. There

was a variety of work histories. Some had been made redundant in previous work, some were looking for a change and some had taken a career break for family reasons. The common account was that they became interested in the combination of teaching driving and the concept of the business as explained to them by Mr Benson and others on behalf of JBL.

11. There are twenty Claimants. They were each represented and appeared, save for the Fourth, Fourteenth and Seventeenth Claimants, who did not appear at the trial. These unrepresented claimants were informed of the trial and appear to have elected not to participate in the trial. At the outset of the trial, this point was raised with the parties, and the Court was satisfied that they had knew about the hearing, and they still decided not to attend. The Fourth and Fourteenth Claimants did not provide witness statements: the Seventeenth Claimant provided a one-line witness statement but did not attend trial to be cross examined on the same.

12. The other Claimants all gave evidence. They were represented by Mr Mark Stephens of Counsel instructed by Aquabridge Law, which firm was involved at the point of the termination of their contracts in late 2020, in the commencement of proceedings on 2 March 2021 and thereafter. JBL was represented by Mr Andrew Butler KC and Ms Annie Higgo of Counsel who were instructed by Holmes and Hills solicitors who for many years have represented JBL including receiving correspondence leading to the termination of the contracts.

13. There are also Part 20 claims brought against guarantors who entered into guarantees of the franchise agreements. Many of the franchisees did not own a property of their own, in which case JBL required a guarantee, often from a parent. Whilst this did not involve a charge of the property, the experience of JBL was that enforcement of a judgment was easier where the person with whom they contracted owned a property. The Part 20 Defendants, the guarantors, have not been made parties to the preliminary issues, and so did not appear or play any part as guarantors in the trial.

IV The witnesses

(a) Mr Benson

14. The main evidence for the Defendant was provided by Mr Benson himself. Whilst he was sometimes charming and cooperative, his evidence was frequently aggressive and sarcastic. It provided an insight into the complaints about his conduct with franchisees as described in their evidence. I found him to be belligerent and sometimes overbearing. It is difficult to give a flavour without watching it in live time. Further, the Court cannot do the second best of providing extracts from a transcript because the case has not been transcribed. However, by reference to my notes, there are examples which were striking at the time of his evidence.

15. On one occasion, Mr Benson replied to Mr Stephens of Counsel in the belief that a question had been asked twice before, saying words to the effect: *"for the third time, I have explained it."* On another occasion, he said words to the effect: *"I've already told you that a few minutes ago."* In submissions on behalf of JBL, it is said that this was simply understandable frustration from being asked the same question more than once.

It was a responsible submission to make, but in the context of the evidence as a whole, I do not accept it. The answers in tone and in the number of such answers went far beyond understandable frustration, but were indeed belligerent and aggressive.

16. Second, having not liked the fact that Mr Stephens was properly putting to Mr Benson that he had been making threats to franchisees, he said words to the effect *"the word 'threat' which you love, Mr Stephens."* This invective against Mr Stephens only got worse. On one occasion, when a document was put to him by Mr Stephens, he said words to the effect *"I do not know what you are reading. It must have been written in invisible ink."* When asked a question about Paul Beck, a trainer, he said: *"That is a silly question."* To another question, he said to Counsel *"that is a ridiculous thing to say."* He regularly used demeaning words such as *"nonsense"* and *"ridiculous"* to characterise the questions asked. When it was put by Mr Stephens that he wrote "aggressively", Mr Benson replied with the following or words to this effect *"It's that word again…you love it."* It was submitted on behalf of JBL that Mr Benson was *"inappropriately pugnacious"* and *"on occasions too confident"* in the correctness of his positions. These characterisations understate the position in order to neutralise the evidence.

17. In my judgment, it went beyond merely crossing the line of someone who was provoked in repeated questioning. They were confrontational and intended to undermine Counsel. They were disrespectful both to him and to the process. They were telling about Mr Benson's approach to other people when not getting his own way. The importance of the extracts from the evidence is that if this was the way in which Mr Benson behaved in the formal environment of a courtroom, then it is likely that it bears out overbearing conduct related by franchisees about his conduct at the workplace.

18. The fact that Mr Stephens was still able to continue his cross-examination unaffected by this persistent sarcasm and abusive behaviour reflects well on his resilience and expertise, but it does not alter or mitigate the conduct of Mr Benson as a witness. It is not that the Court is marking his evidence in some register of manners for witnesses. Still less that the Court is ignoring the "real world" where some people in management might tend to be overbearing or used to getting their own way. It was said that the Court should take into account that such strength of character would have been a factor in building up a successful driving school from which the franchisees will have derived a benefit.

19. It appeared that Mr Benson will have derived considerable benefit from his determination and industry and strength of personality. I do not accept that the franchisees as a whole will have benefited from such overbearing conduct. The persistent invective and sarcasm of Mr Benson in the witness box helps substantiate the numerous allegations of intimidatory conduct by many of the franchisees who gave evidence. I found Mr Benson a person used to getting his own way. He was a person who brooked no opposition. He did treat himself as if he had control over the franchisees. He was unsympathetic to those whose interests were different from his own. Examples will appear later in the judgment.

20. It is said on his behalf that he was possessed of a moral code to which he adhered, that he believed in honouring obligations and that *"not for nothing, is he a successful franchisor"*: see the closing submissions of JBL at para. 21. Having seen Mr Benson in the witness box over 3.5 days and having heard the totality of the evidence, I take the

view that this is only half the picture. When the whole picture is examined, the propositions are wrong. He has a moral code in his own favour, and this does not extend to considering adequately the interests of the franchisees as made apparent by the signing up process for the agreements or the extension agreements when franchisees had been in default, described below in this judgment. He believed in honouring obligations to him, but that does not mean that he is a man who is particularly zealous about all kinds of obligations.

21. He is said to be a successful franchisor. If, without detailed evidence, it is to be assumed that he did well financially as a franchisor, that does not make him a successful franchisor in that there is more to being a successful franchisor than money. There will be considered in this judgment whether he ran a franchise in which franchisees generally thrived, and there will be examined the number of franchisees against whom there were actions, the number who were terminating early and the circumstances in which franchisees entered into longer agreements in order to keep their heads above water. The Court does not have to decide if he was a successful franchisor, but it will not accept that appellation simply on the basis of whether he did well for himself financially.

22. He reacted to a statement made in respect of the franchisee Ms Newell who said that she was scared of Mr Benson going after her with a gun after he had put his hand into the shape of a gun. He said of her the following or words to like effect, namely it was *"the most cynical and nonsensical thing that I have ever heard that she fears me going after her with a gun. She is saying it because it suits her."* Given the fact that Mr Benson had had a conviction for a firearms offence which was sufficiently serious to cross the custody threshold (albeit that an actual sentence was reduced on appeal to a suspended sentence), one might have expected a more conciliatory and understanding approach.

23. The strength of the denials of Mr Benson to allegations against him did not add to the plausibility of the denials. I found his evidence unsatisfactory in the respects set out above, and I accept many of the allegations about aggressive and intimidatory conduct. There was further support for the overbearing nature of Mr Benson's conduct in contemporaneous documents including especially Facebook posts and such tapes as remained in respect of recorded conversations.

(b) The Claimants

24. I found that there was a resonance about the Represented Claimants' evidence. It gave a common picture about the nature of the relationship between them as franchisees and Mr Benson on behalf of JBL as franchisor. It gave a very distinct picture about the dominant and domineering nature of Mr Benson. It gave a feel about the impact of Mr Benson on them. I found the big picture points credible.

25. That is not to say that every detail of what was said would be accepted or that they would prove all of the allegations made or the evidence given which was not specifically alleged in the statements of case. JBL is entitled to give a warning about groupthink. There is the danger as in other litigation of parties getting together as a group and putting words into one another's mouths. I have had that well in mind in the instant action.

26. I accept the danger that the importance of the case might make witnesses give evidence of matters as they would like them to have been. This case is very important to the Claimants, especially to those who have family members as guarantors. The case is also very important also to JBL and to Mr Benson in that it has put under the microscope the way in which the driving school was operated including serious allegations about the way in which franchisees were treated. It is evident from Mr Benson's regular use of the courts how central it was to his business to be able to sue franchisees who fell out of line, and how he would rely upon the victories as a source of warning to those other franchisees who may have been thinking in a like way. Likewise, the prospect of losing carried with it a potential price both as regards the instant action and beyond it. This action was of great importance because it accounted for a minority, but still a significant percentage of the franchisees, and collectively the counterclaim adds up to a sum approaching two million pounds.

27. JBL suggest that there has been snowballing of evidence. It is inevitable that memories would be jogged by hearing about the experience of others. I accept that there are dangers about the creation even unconsciously of confirmatory evidence which may not be reliable recollection. As in most commercial cases, it is important to pay particular attention to contemporaneous documentary evidence and the overall probabilities of the case, and to assess oral evidence in large part by reference to documents and inherent probabilities. Some of the evidence is confirmed by documentation including by way of example the messaging about what happens to defaulting franchisees, the language used in respect of COVID and particular language to franchisees at times of vulnerability.

28. It was said on behalf of JBL that the Claimants lacked an overall balance which was based on a "tendency to demonise". I shall refer to the various Claimants in respect of their evidence. I recognise that they were very critical about Mr Benson. I have to decide whether this evidence was therefore unreliable or to be treated with caution or whether the connecting tenor of the evidence provided a big picture of controlling, aggressive and abusive behaviour.

29. A legitimate criticism of the evidence of the Claimants is of imprecision. That is to say that there were too many instances of conversations which were not dated in the evidence. This led to what JBL has rightly described as the laborious task of piecing together the evidence. The lack of specificity does give rise to the danger of mistaken recollection. However, such was the assiduous nature of the barristers in this case, particularly the two counsel team of Mr Butler KC and Ms Higgo for JBL, that it was possible to tie in many of the allegations to contemporaneous documents. In some respects, this revealed errors of recollection. The Court must treat with caution evidence that was imprecise and this will be borne in mind. It might be rejected where a respondent could not be expected to meet the allegation because of the lack of specificity. Generally, in this case that has not been the case, and JBL has been able to address each of the allegations. I shall refer to the evidence of the Claimants and other witnesses in more detail below.

V The history of the driving school

30. The franchise model of JBL (including the predecessor business before the incorporation of JBL) has been going for just over 30 years. During that time, it is said that there have been about 1300-1400 franchisees. It is said without financial evidence that the business has been successful financially for the driving school. According to the unchallenged evidence of Mr Benson, there are currently over 100 franchisees of which *"about 6 of those franchisees have been with us for 20 years or more, about 12 have been with us for 10 years or more, about 24 have been with us for five years or more and there are plenty of instructors that have been with us for three years or more."*: see Mr Benson's witness statement at para. 5.

31. There is evidence, again without detail or precision, that there have been about 90 court cases against franchisees or former franchisees or guarantors over a period of 30 years. There is no breakdown of the cases. No detailed breakdown was provided despite requests from the Claimants' solicitors. The Claimants say that this is a large number of court cases evidencing that there is something deeply wrong about the relationship and the aggressive approach of Mr Benson to his relationship with franchisees.

32. JBL says that this represents a small percentage of the franchises over the 30 years or more, and it reflects that a number of franchisees who were not observing their contractual obligations. When this occurs, JBL says that it has to enforce the agreement because it has legal rights to do so and for the good of the franchise as a whole in that a successful franchise depends on the obligations under the franchise agreements being honoured. JBL also says that if there was something so endemically wrong that most of the franchise agreements resulted in litigation, then the business could not have been successful and enduring. The Claimants say that the number of claims or Claimants in this action is not indicative of the number of dissatisfied franchisees. In order to terminate early or even to show dissatisfaction showed courage. The former brought the risk of counterclaims for lost profit for the remainder of the term as well as the ordinary risks and stresses of litigation. The latter risked, so it is claimed, being on the wrong side or worse of Mr Benson and/or not having new pupils being referred to them.

33. The franchise model for driving schools is prevalent in the industry including upon national schools such as the British School of Motoring, the AA Driving School and Red. Prior to 1993, Mr Benson was a franchisee at the British School of Motoring. Typically, the franchisee owns the trademark, in this case the Benson School of Motoring. The arrangement is that the franchisor provides to franchisees advertising material for distribution and provides guidance to assist with the business of the franchisee and assists in connection with publicity requirements. The franchisor refers pupils to franchisees, and under the instant franchise agreements, there are non-guaranteed numbers of referrals which a franchisee can expect to receive. The agreement states that one of the factors which will determine whether pupils are referred is whether the franchise is operating the franchise in accordance with the agreement.

VI Various features of the relationship

(a) JBL's franchise agreements

34. There was a large bundle at trial of franchise agreements between the various Claimants and JBL. In respect of many of the franchisees, there was a number of successive franchise agreements. The franchise agreements evolved with time as new provisions were inserted. An example of this is that whilst there has never been an express term of good faith, since, and as a result of, the dispute in the instant case, there has been an express exclusion of any term of good faith. The agreements in question in this action do not contain an exclusion of terms of good faith.

35. Before considering the terms themselves, there are certain features about how the individual franchise agreements were made. There was no negotiation of terms in the sense of give and take about contractual terms. The strong impression that one has is that most of the terms were on a take it or leave it basis.

36. The franchisee did not have the opportunity to take home the draft agreement and to consider it with family and friends, or indeed to read it at leisure. Several franchisees gave evidence that on the first occasion that the agreement was presented to them by Mr Beck of JBL, he said words to them to the effect that it was a great opportunity for them. However, he said that they could not take the agreement away, but that they should read it at the premises of JBL. He said words to the effect that the terms may not be the same if they did not sign it there and then. This is referred to in greater detail when considering below the evidence of individual franchisees.

37. Mr Benson was asked about the reading of the franchise agreements by prospective franchisees before signing them. He said that they all read the agreements *"to a certain extent."* He said that they needed to read clauses 1 and 7. (Clause 1, which is referred to in the next section about the duration of the agreements, is difficult to understand. Clause 7 is about franchise fees including annual increases). He said that a lot of people did not read the agreements, but they were told to read them. These answers show an appreciation that the agreements were not read properly. There must have been an appreciation that even if they were read, they must not have been understood fully.

38. There is at the top of the agreements in red and in block capitals the following wording, namely : *"if you are in any doubt as to the meaning of this agreement you should consult a solicitor. A copy of this agreement can be sent to your solicitor upon request and before signing. Do not feel that you must sign today."* The evidence is that this happened, but only very occasionally, less than a dozen times. In the context of many hundreds of agreements, it appears that the standard form was formulaic: if it had any impact, that was negatived by such pressure as there may have been to sign the agreement there and then. The wording was not that franchisees should take legal advice, only *"if you are in any doubt as to the meaning"*, and there was no assistance as to how to find a suitable solicitor.

39. The franchisor could have taken the view that the agreement was vitally important to a new franchisee, that they were entering into the acquisition of a business interest, the nuances of which they were unlikely to understand without assistance. The view of the franchisor could have been that bearing in mind the inequality of bargaining power that

would ensue from entering into such an agreement without independent legal advice that it was desirable, indeed essential, for the franchisee to be so advised. This did not occur. Likewise, despite the prevalent custom of not permitting guarantors to sign without independent legal advice, among other things for fear of the guarantees being set aside for undue influence, there was no such advice in respect of the guarantors in the instant case.

(b) Terms of the agreements

40. There is a specimen agreement in Annex 2 to the Particulars of Claim ("POC"). The agreements contained an explanatory provision that the franchise agreement was for a minimum term and could not be terminated by the franchisee prior to the expiry of such minimum term. There was then an often complicated provision about the duration of the franchise agreement. It was not easy to understand these provisions even for someone used to construing documents: it must have been very difficult for a prospective franchisee without independent legal advice. The minimum term was three years or longer periods which would be triggered often from the time of passing the three parts of the training to become a driving instructor (Clause 1).

41. There were no early termination provisions for franchisees. The agreements contained a warning also in red bold that it cannot be terminated prior to the expiry of a minimum term. There was no provision for the sale of a business to another franchisee. The effect is that if a franchisee wanted to have an early termination and to have another franchisee introduced by them to take over, JBL could refuse this. Mr Benson said that save for allowing a husband to take over from a wife as franchisee, he has never been asked by a franchisee to permit the sale of a business. If he did, he says that he would have been open to negotiations. However, there is nothing which would compel JBL to agree to this, and there was no mechanism for it under the agreements. Since this did not occur, it is theoretical.

42. There were instances of driving instructors finding themselves unable to honour the payments and Mr Benson agreeing, instead of terminating the relationship and suing for damages, to a new longer agreement. This then led in turn to agreements with a minimum term of up to 120 months, even in one case 132 months, instead of 36 months, this usually being in addition to the training periods.

43. The Claimants pleaded (POC para. 3) that *"the Claimants each committed to long term commercial relationships that required them to cooperate and collaborate with JBL."* This was admitted by JBL. There was no evidence to explain why the relationship had to be of such a long-term nature, and as to why it could not have been such that it could have been terminated within a much shorter period. That might have been with an option to enter into a longer period in the event that the franchisee was not materially in breach of terms of the agreement. Evidently, the business model was that in the early part of the relationship, the franchise fees would be relatively low, such that the profit for the franchisor would come in the latter stage of the relationship. That could have been factored in by keeping separate a training agreement or a franchise agreement. Or it might explain a longer period up to say a full year of larger payments or arguably up to two years, but after that there is no explanation as to why the much longer periods were required, even 36 months going up to 132 months.

44. A particular problem for the franchisee was that at the inception of the relationship, it would be unknown how long it would take the franchisee to qualify. Further, it would be unknown whether a franchisee would have the qualities required to succeed in the business. Even if they could start by succeeding, it would be unknown whether the franchisee would have changes in their life that would impede continued success such as health issues or caring issues as regards relatives such as children, parents or partners. That made it particularly onerous to enter into a long-term franchise agreement at an early stage in the training. In addition to this, the uncertainties about how long it would take to become fully qualified made the provisions about the term of the agreement difficult to construe and understand. In addition to that, there is the issue of why the first franchise agreement was entered into only before training was complete or at least the part of the training period which did not involve instruction of pupils.

45. The first franchise agreement between JBL and a franchisee typically contained provisions about training to become a driving instructor during which there would either be no franchise fee or a modest fee. Although there are three stages referred to therein, the first period does not begin until the franchisee starts to give paid lessons or 12 months after signing the agreement, whichever is the earlier. During that period, the franchisee must pay for training at a cost of £30 per hour, but is not obliged to pay franchise fees. There are three tests, known as Part One (a multiple-choice theory test), Part Two (an approved driving ability test) and Part Three (an instructional ability test). When a potential driving instructor has passed Part One and Part Two and has taken a minimum of 40 hours training, they can apply for a training licence. At that stage and whilst preparing for the Part Three test, the trainee can provide paid tuition to the members of the public. The trainee must take on at least another 20 hours of training before they may apply for Part Three. The trainee must qualify within 2 years of passing the Part One, failing which they must start again. There are further rules about re-takes following failing any test.

46. At the conclusion of training or 12 months, whichever is the earlier, the first franchise period is a start-up period of small franchise fees increasing over the course of a year. The second franchise period begins when the franchisee becomes an Approved Driving Instructor. Its duration is equivalent to the sum of (i) the length of any start up; (ii) any period of suspension; and (iii) a further defined period of time, at least 36 months. If the start-up is a year, and there is no period of suspension, the second franchise will last for four years.

47. Following nil or small franchise fees, by the time that the franchisee is expected to be fully qualified, there would be fixed weekly fees not by reference to turnover. That was advantageous to a successful franchisee, but would cause hardship to an unsuccessful franchisee. All of this made it very difficult to work out both prospectively and retrospectively, that is before, during and after training periods, the term of the particular franchise agreement and its end date.

48. In the meantime, if a franchisee was in breach of the terms, there were termination provisions on the part of JBL (Clause 9 of the specimen agreement). The effect of the drafting was in favour of JBL to elevate an ordinary breach of contract into something that could be relied upon for an early and repudiatory breach of contract. The contractual consequence in such an event was to make the franchisee liable for *"the sum which would have been payable by way of franchise fees and other charges had the agreement not been terminated as a consequence of your breach."* It is this which

explains the very large sums counterclaimed against the franchisees in many cases several tens of thousands of pounds, in some cases over £100,000 and in one case, on one measure, over £300,000. It is also a part of JBL's case that there is little or no scope for mitigation of loss because a loss of franchisee cannot be replaced by another franchisee in that the new franchisee could always be taken on in addition to the old franchisee.

(c) Independent business or control

49. It was not a part of the case of the Claimants that the relationship was that of employer and employee, but it was said that the commercial relationship had hallmarks of an employment relationship. This was relevant to the submission of the Claimants that these were relational contracts under which the parties owed a duty to conduct themselves in good faith and to deal fairly with one another. This is the first of the preliminary issues which will be specifically addressed later in this judgment.

50. It is to be noted that the typical franchise agreement contained provisions to the effect that the franchisee was an independent business. This included the following:

(1) By way of background that *"this document is a Franchise Agreement granted to you as an independent self-employed Driving Instructor."*

(2) *"You will, as a self-employed person, carry on your own business keep and maintain all necessary books of accounts and records and be responsible for discharging all VAT, income tax, National Insurance and any other charge or duty for which you are liable."*

(3) *"You will observe all laws and regulations relating to the running of your business as a driving instructor including driving standards agency regulations."*

51. Despite these provisions which may have signalled that it would not have been possible to prove the existence of an employment relationship, the following features of the instant franchise agreements, when looked at cumulatively, have hallmarks of such a relationship. They are as follows:

(1) the agreement was made expressly between the franchisee personally and JBL, even if they are trading through a limited company;

(2) there was no express power to delegate or sub-contract performance or to transfer the agreement to anybody else. There was no income from pupils re-allocated to other instructors;

(3) there was an obligation *"…not during the subsistence of this agreement [to] give driving lessons other than in the name of the franchisor and subject to the terms of this Agreement."*

(4) the franchisee was to *"devote substantially the whole of your time and attention to your franchise and shall not carry on any other business other than the franchise or become involved either directly or indirectly in any other business activities in any capacity without the prior written consent of the franchisor"*, such consent being capable of being withdrawn on 28 days' notice: see Clause 5(j) of the contract attached at Annex 2 to the POC;

(5) whilst the franchisee was free to choose its own holidays, there were only two franchise free weeks a year to be taken subject to various conditions set out in Clause 8. The franchisee may take off other weeks but franchise fees remained payable in those other weeks. Given that franchise fees were fixed per week rather than by reference to turnover, the effect was that the practical scope for taking holidays was limited, given the need to pay the substantial weekly fees;

(6) the franchisee was to act in the *"best interests"* of the Franchisor (Clause 5(a))

(7) the franchisee was to use *"best endeavours"* at all times to assist the Franchisor in developing and improving the Franchisor's business (Clause 5(b));

(8) there was an obligation *"to give tuition in accordance with guidelines laid down by the Franchisor"* (Clause 5(f)). The Franchise Handbook, which will be referred to below, comprises *"19 very important pages that must be read and comply with before/during your franchise running* (sic)". The cover page provided that promotion must be *"for and on behalf of Benson School of Motoring as a whole and not yourself as an individual".* This was provided at the outset of the relationship, and although referred to as guidance, it was in essence a book of instructions and compliance was required;

(9) at least until 31 January 2020, the franchisee was to *"charge for driving tuition only such fees as are prescribed by the Franchisor"* (clause 5(g)): this is discussed further below. At least until then, JBL did not permit contractually the franchisee to fix their own fees, though JBL's evidence was that it had not enforced the clause for some time.

(10) There is set out in this judgment a small number of the 24 obligations on a franchisee at clause 5 of the specimen agreement in Annex 2 to the POC, some general as above and some very detailed. In addition, in clause 3, there were six obligations on franchisees as regards their vehicles.

(11) There were five obligations on JBL about (a) making available advertising material, (b) providing guidance to assist the franchisee and assisting with the achievement and maintenance of the business, (c) advertising its brand, (d-e) without any guarantees and as far as reasonably able having regard to the number of inquiries and the requirements of other franchisees, referring pupils where reasonably possible (a non-guaranteed expectation of 40 referrals in the first year). The last of these obligations (d-e) were expressly subject to the franchisee being "primarily responsible for promoting [their] own business", (Clause 4).

(12) The franchisee agreed that they had not entered into the contract in reliance on representations and warranties and the agreement contained "the entire agreement between the parties." (Clause 12)

52. Franchisees could either be provided with a car from JBL or they could provide their own. If it was the latter, they had to agree the make and model. Mr Benson stated that the reason for this was to keep the brand distinctive from competitors.

53. Until January 2020, JBL set a price for the lessons. A complaint in the action was that the prices were set too low and that other franchisees charged much higher sums. This was said to have the immediate effect of not only restricting their profits, but making it difficult to earn enough to pay the franchise fees. Further, it did not allow for an increase in the fee where a franchisee had to go out of their area to teach a pupil and thereby incurred travelling expenses which they could not recoup.

54. It was suggested in cross-examination that a corresponding benefit of a lower charge was that the prices would be competitive and would bring in business. Witnesses were not receptive to this suggestion usually because of a belief that it made it more difficult for them to pay their franchise fees and other expenses and then come away with an ability to meet their living expenses. The set fees did not increase from June 2018 to January 2020 when an email was written purporting to scrap set fees. Even thereafter, as a recommended price, the same prices remained the same until September 2020. The fixed prices were not adjusted for inflation or petrol costs and did not take into account the distance which franchisees would need to travel to collect a particular student or the time it would take them to do so. The franchise fees payable to the franchisor increased every year (£18 per week or £9 per week, depending on what was agreed), but the fixed prices for lessons did not increase during that 18-month period, thereby potentially affecting the profitability of the Claimants' businesses.

55. By a letter dated 28 January 2020, an offer was made by JBL to amend this provision by its deletion which would take effect within 14 days if there was no response. This provision was then to be removed with effect from 11 February 2020. When subsequently a franchisee ended up losing business, Mr Benson believed that this was a consequence of no longer following a price set by JBL. In a Just Benson post, dated 19 March 2020, he publicly criticised an instructor for doing so, saying:

> "I did warn some of you…listen to this. We had a call yesterday from a pupil of ours.
>
> His instructor (one of us) just increased his lesson free to £26.50…the pupil asked for another instructor which we supplied.
>
> The first instructor has lost what £750 minimum? How stupid."

56. On 29 September 2020, after the first wave of COVID-19, Mr Benson sent a letter to all instructors saying that the tuition rates for manual cars and for automatic cars respectively had been increased by £1.

57. Mr Benson prohibited franchisees from publicising how much they charged from lessons. On 30 September 2019 Mr. Benson told the network:

> "DO NOT MENTION PRICES! …
>
> LISTEN TO ME … do not mention what we charge; last time I tell you!"

58. Mr. Benson threatened to impose restrictions on their ability to advertise their services. He told the network that he would remove instructors from the Just Benson Facebook group if they advertised their prices, and on 4 October 2019 confirmed that he had done so:

> "There's the first Benson instructor removed and blocked from the Benson Facebook groups for posting our prices."

59. It is not an answer to the findings that the agreements were akin to employment relationships to say that the franchisees could do as little as they liked or that they could do no work (as per para. 15 of Mr Benson's witness statement). The reality was that a franchisee had to work in order to afford the weekly franchise fees payable for every week of the year save for two franchise free weeks. This was at a significant level not by reference to the turnover of the franchisee (such as a royalty fee), but as fixed fees. The consequence of the fixed fees is that franchisees had to work, most of them full time, in order to pay or to strive to pay the franchise fees.

60. In the absence of an express provision about delegation, it is futile to discuss the possibility of delegation. There was considerable control over the franchisees rather than a degree of control. The various aspects of the agreement amounting to control are identified in this judgment. The way in which the office was operated was not a service to franchisees but was the hub of the franchisor's operation. It provided a framework whereby the franchisees were obliged to phone in at least twice a week (Clause 5(u)). There was a structure so that new franchisees had to be referred to head office in that franchisees were not even allowed to quote prices to a prospective pupil. When a franchisee did that, he was removed from Facebook and publicly humiliated.

61. For most of the life of the agreements, there was an insistence that the franchisees only charged the prices fixed by JBL (Clause 5(g)). It is one thing to provide the facilities of an office: it is quite another to require that new bookings come through the head office. To like effect, in respect of all of the franchisees, the vehicle's sign writing should be to the Franchisor's specification (Clause 5(s)). JBL almost always insisted that the number of head office and not the private number of the franchisee must be displayed on their car, albeit that in the case of Ms Rusted, they allowed her private number to be displayed. This then enabled head office to receive inquiries and to

allocate as between franchisees as they decided. This was a form of control, which would have been reduced in the event that the calls came to the private mobile numbers of franchisees. The judgment will turn to this below because it is alleged that there was a breach of contract in capriciously refusing franchisees' requests to display their mobile number. Whether it be the case that the contract enabled JBL to refuse absolutely any such request or it was at the discretion of JBL to refuse, this was an element of control of the franchisee by the franchisor. There was also evidence of JBL through Mr Benson giving instructions to head office not to provide referrals to franchisees who were in Mr Benson's bad books. These features support the agreements being akin to an employment contract, that is to say having various hallmarks of an employment relationship, even although they were not contracts of employment.

(d) Extension of agreements

62. There has been a lot of evidence in this case of franchisees falling into difficulties. There was evidence of a large number of franchisees who fell behind in their payments of monthly franchise fees. There was a variety of reasons given for this including the following:

(1) the inability to secure sufficient pupils, in the case of Haverhill it was alleged that this was due to alleged flooding of the numbers of franchisees in the area;

(2) the inability to secure sufficient pupils through advertising, particularly the complaint that the franchisees were unable to have their own phone numbers displayed on their vehicles;

(3) too few pupils being referred to them;

(4) the effect of having pupils some distance from one another was that franchisees had to spend time travelling to the next pupil, thereby having time during which they were not earning money and incurring petrol expenses which could not be recouped and without the ability to charge a premium to a pupil;

(5) the impact of the annual increases in the franchise fees going up in many cases by £18 per week whilst the price of lessons did not increase or did not increase at that rate (from June 2018, it did not increase until September 2020, and at least up to January 2020, there was a term requiring the franchisee not to depart from the price set by JBL);

63. Subject to unusual exceptions, the franchisees were unable to advertise by driving in vehicles which displayed their own telephone numbers. They were also unable to publish their own prices. This was said by JBL to be best form of advertising because the vehicle would be going round the areas where the instructors taught, and it was through that number that they could most easily attract business for themselves.

64. The evidence particularly of Ms Summers was striking about numerous franchisees who fell into arrears and terminated early. Many of them settled on early termination

provisions. Ms Summers' witness statement at para.25 comprised information of 70 franchisees who either ended up in court or bought themselves out or gave notice at the right time. Most had left early and had entered into a settlement agreement. Some had been sued to judgment in court. This was information which could have been provided when sought from JBL by instructing Holmes & Hill their solicitors to provide analysis about what happened instructor by instructor in advance of the trial. In the absence of this, there was a long time spent at trial in getting some information in respect of the first 23 of the 70 franchisees named by Ms Summers. It took so long to elicit it in cross-examination from Mr Benson, and the information was understandably far from precise, that the process had to be aborted because it would take far too long. The obvious point is that if there was a healthy operation where the vast majority of franchisees operated in a profitable way, there would not have been so much litigation and so many franchisees paying money to buy themselves out. Ms Summers said Mr Benson said repeatedly that *"one court case a year is what keeps the business afloat"*.

65. Without having to find at this stage that the foregoing arose out of a breach of contract, it provides a backdrop to the phenomenon of the numerous extensions of the agreements. JBL's case was that this was out of sympathy to franchisees suffering difficulties in keeping up with payments due under the agreements, Mr Benson on behalf of JBL would offer revised agreements for longer periods of time with smaller weekly franchise payments. The result was that instead of having a minimum period of 3 years plus the training period, franchisees would commit themselves to much longer periods including periods as long as 10 years or even longer.

66. A simple secondary way of summarising the extensions of the franchise agreements is to consider the Counterclaims. That evidences how complicated it was to calculate the original training periods. It also shows the periods during which no franchise fee was payable due to COVID closure being added to the counterclaim on the basis of a contention that the agreements were extended by these periods. Just concentrating on the minimum periods exceeding 36 months which were agreed by new franchise agreements, the Counterclaim points to the following periods of longer than normal periods from the outset (many of which will be substituted periods replacing shorter periods), namely:

(C1) Mr Ellis: 60 months;

(C2) Mr Hayward: 120 months;

(C4) Mr Patterson: 60 months;

(C6) Ms Rusted: 120 months;

(C7) Mr Stubbings: 60 months;

(C11) Ms Newell: 132 months;

(C12) Mr Dzierzanowski: 60 months;

(C14) Mr Mackintosh: 60 months;

(C15) Mr Maples: 60 months;

(C16) Ms Newman: 111 months;

(C18) Mr Tanfield: 60 months;

(C19) Ms Thornton: 60 months.

67. The effect of these extensions is not only that franchisees became locked into the agreements for longer periods, and in four instances for over 100 months, the effect was that in the event of breach or a desire for early termination, the exit sums would generally be significantly higher (although at least in the case of Ms Summers, this was shown not to be the case). Whilst there were reductions in the weekly fees, it was not transparent what the difference was between the total payable under the old agreements and the amounts payable under the new agreements. The very large amounts claimed under the Counterclaim including many of them being £90,000 and over and one more or less than £300,000.

68. There was a modus operandi to the new extended agreements. Although there was a clause about legal advice in both the existing and extended franchise agreements ("if you are in doubt as to the meaning of the agreement") these franchisees did not obtain legal advice. They took the view that they were already locked in as a result of their earlier agreements and that if they did not enter into these agreements, they would be unable to perform the earlier agreements and would be accountable for their breaches for sums which they could not afford. In so doing, they did not consider the extent of the obligations which they were taking on and the consequences of breach of the new agreements.

69. Ms Rusted, the Sixth Claimant, made a claim of breach of contract by being required to extend her franchise agreement from 5 years to 10 years when she said that she could not afford the franchise fee: see G(iv). Ms Summers said that she extended from a minimum of three years to five years and then to ten years. She said that she was unable to survive financially due to having to pay the franchise fees which were increasing whilst the prices of lessons were not increasing correspondingly. Ms Newell, the Eleventh Claimant, made a claim of breach of contract that she was pressurised to extend her franchise agreement for a ten year agreement after failing to pass her standards check and being unable to pay franchise fees. There is no indication that these franchisees had any understanding of how the reduced payments were calculated or an explanation of how the total amounts compared with the existing agreement.

70. Without adjudicating upon these allegations of breach of contract at this stage, the history of these extensions provides a context for other alleged breaches of contract in this case. First, the finding that the standard agreement of 36 months (discussed at paragraphs 74 to 79 of this judgment) plus was a long-term commercial agreement between the parties applies a fortiori in respect of the longer agreements. This is relevant to the finding about the existence of implied terms. It is suggested by JBL that this was not necessarily a long-term agreement because there are agreements which are for much longer periods. Everything is in context, but in the context of a driving instructor, a contract for the training period and a minimum term of 36 months is a long term contract. It is difficult to understand why it was not subject to any shorter notice period for the franchisee or for a shorter minimum term other than to tie the franchisee into it for a long period and to form the basis of a large claim in the event that the franchisee did not succeed or wished to leave. Although there was limited evidence

about the typical length of franchise agreements of other driving schools, reference will be made below to the Bill Plant driving school. That was introduced by JBL for a different purpose. It contained a short termination provision at the behest of the franchisee of six months' notice after the first year.

71. Second, the extensions involved desperation, that is to say, facing failure there and then with a possible termination and large damages or being subjected to a longer term with the disadvantages of being locked in for a very long period. Further, without dealing with breach of contract, the situation may have had as its origin the fact that the business model of JBL did not work for a substantial number of franchisees. This applied particularly in the context of COVID which would have provided difficulties to most successful franchisees. When faced with franchisees struggling because the model was not working for them, the Claimants' case is that there was a particular need for implied terms of good faith. This will be considered as the first of the three preliminary issues.

72. Third, even on the premise that this did not give rise to privileges about not enforcing contractual rights, it did mean that it was more important than ever not to behave in an intimidatory and aggressive way to franchisees who were faced with financial existential issues. Likewise, it meant that it was important not unilaterally to claim rights which did not exist e.g. seeking to extend the agreements on top of the already very long agreements already negotiated.

(e) Collaboration, communication and cooperation

73. The pleaded case is that the franchising agreements gave rise to *"long term commercial relationships requiring a high degree of communication, cooperation and predictable performance with expectations of loyalty".* I find that the evidence shows that the commercial relationships had the following features.

74. First, whilst the concept of long-term commercial relationships is imprecise, and it is far less long than some relationships which go on for decades, I am satisfied that the minimum term provisions did give rise to long-term relationships. Even those which contained a period of three years in addition to the training period were long periods, given the inability to terminate at any earlier stage. A fortiori, this was the case in respect of the many agreements which were for longer periods. Once franchisees were unhappy, they would come to recognise the fetter of not being able to terminate for years.

75. Second, there were expectations of loyalty in contractual terms. This included the inability to act as a driving instructor other than as franchisee, and indeed a promise not to have any other business without the consent of the franchisor. There were also clauses requiring the franchisee to act in the best interests of the franchisor, which was a clause similar to a fiduciary who has to relegate their own interests to those of the counterparty. Likewise, there was an obligation to use best endeavours to improve the franchisor's business.

76. Third, the franchisees had no right to delegate the services provided by the franchisee to any third party. Likewise, they had no ability to acquire a goodwill of a business which they could sell to a third party. There was no provision for being able to assign

the franchise agreements. This has to be seen in the context of having a long-term arrangement without a provision for early termination. It is to be contrasted with the extensive rights of termination in favour of the Franchisor in which non-repudiatory conduct can become elevated into a ground for termination or a deemed repudiatory breach.

77. Fourth, the expectation of JBL was that the franchisees could not themselves advertise the business in their own names by having their telephone number on their vehicles. With very few exceptions, the cars had to bear the central office number only and not their number. The consequence was that bookings of new clients would be through central office and not by themselves. When they acquired new clients, they were dependent on referrals from central office. This required very frequent communication between the driving instructor and head office. Separately, there is a pleaded allegation of breach of contract about the refusal to permit franchisees to have their telephone numbers on their vehicles.

78. Fifth, the driving school imposed rules of conduct, and a sanction for breach was the withholding of pupils. Examples of rules requiring close collaboration that were provided were as follows. There was an expectation that the franchisee would be in regular touch with central office *"on a regular basis and at least twice per week in order to receive new client details and other necessary information concerning the running of your franchises"* . Failure to do so might lead to the franchisee being contacted at a cost to the franchisee and with the assumption that the franchisee does not require any further work and that other franchisees may be preferred (Clause 5(t)). Since central office was so busy (and possibly under-resourced), there was a three rings policy such that an instructor would be required to put down the phone if not answered within three rings.

79. Sixth, there was an expectation that the franchisor would provide guidance to the franchisee to assist (Clause 4(a)) and would refer prospective pupils when reasonably possible. That involved acquiring an understanding of how the franchisee was performing, where the work was and how much further work was required.

VII The alleged breaches of contract

80. The alleged breaches in the statements of case are of two different kinds. First, there are breaches which are common to all of the Claimants. Second, there are breaches on the part of JBL complained ofby each Claimant separately. Some of those are common, but others are not. All of the Claimants then say that the totality of the breaches of contract of which they complain together and individually amounted to repudiatory breaches which they were able to rely upon to terminate their respective contracts.

81. There will first be summarised the breaches which all the Claimants allege, namely that:

(1) Mr Benson, the controlling mind of JBL, created an abusive and intimidating environment in which the Claimants were required to work. He would regularly insult and be verbally abusive to franchisees;

(2) Mr Benson would boast of having sued former instructors and taken their homes or their guarantors homes, and examples were given of posts on the "Just Benson" Facebook account.

(3) Mr Benson used the Facebook account to make derogatory remarks about female instructors and to publish racist slurs against Gypsies and Irish Travellers and against a former Chinese franchisee.

(4) Prices were set which were too low making the business less profitable with each year and made no allowance for the costs of travelling to and from a pupil's home.

(5) Mr Benson prevented instructors from publicising the cost of their services under threat of sanctions.

(6) JBL recruited new instructors within particular postal areas without regard to the impact on franchisees having to compete with them or to incur additional expenses in serving pupils outside their area;

(7) JBL required franchisees to publicise its business in areas outside their own without any benefit for so doing and under threat of sanction;

(8) JBL required franchisees to distribute leaflets without space for identifying their own contact details.

(9) Almost all requests to advertise the franchisees' own mobile phone numbers on cars were unreasonably refused.

82. Each Claimant made a number of allegations of breaches of their own, some only one allegation and up to as many as seven allegations in the case of the Sixth Claimant, Ms Rusted.

VII The Represented Claimants

83. There will now be considered the evidence of the Represented Claimants, that is the twenty Claimants save for the Fourth Claimant, the Fourteenth Claimant and the Seventeenth Claimant, who did not provide witness statements and who did not appear at trial.

(a) The First Claimant: Mr Ellis

84. Mr Ellis became a trainer in 2017 or thereafter. He said how scared most instructors were of Mr Benson. He related how Mr Benson was aggressive and intimidating, citing his claims about taking people's houses after they left JBL and his conviction for

possessing a firearm and ammunition. He said (para. 19 of his witness statement) that *"it was his way or the highway".*

85. He made four specific allegations in the Particulars of Claim. First, he was removed from the Just Benson Facebook group. That would be damaging for most franchisees, but evidently not for him: he did not mind because he found Just Benson offensive. The fact that he felt that it was offensive such that he was content not to have access to it supports the case about the toxic environment.

86. Second, Mr Benson withheld work from instructors with whom he fell out. He said that when he declined work well out of his area because of the time and cost to him, he did not receive much work after that (paras. 10 and 18 of his witness statement). This was consistent with statements of both Ms Summers and Ms Sharpe in a recorded conversation, referred to in the section about what was put to Wendy Smith below, namely if in his bad books, you went to the back of the pile and Ms Sharpe saying that she was told not to book pupils *"if people pissed him off"*. Mr Stubbings related that Ms Summers had mentioned this to him. Mr Hayward related how he had a discussion with Mr Benson in about 2019 regarding increases in fees which he challenged. Mr Benson did not agree, and around this time, he said that his pupil referrals from the office *"dropped off"* (para. 11 of his witness statement).

87. Third, he witnessed threatening behaviour of Mr Benson towards Mr Elliott, but in evidence, it did not go very far. Although he said that he had seen Mr Benson holding a staff member, he did not see any context. At the time he dismissed it as not being the usual behaviour of Mr Benson.

88. Fourth, he witnessed Mr Benson giving driving instruction after his licence to do so was revoked (following the firearm conviction). The response was that Mr Benson would help to supervise staff trainers during mini-bus days without any remuneration. No breach has been proved, albeit that it incited suspicion for Mr Benson being involved in giving driving instruction whether because any payment was made to a third party or there was no payment made at all.

89. Mr Ellis's evidence dovetailed with other evidence in the case. Simply by way of example, he said that Mr Benson did not explain how long the agreement would last. This corresponds with how the provision as to duration was so unclear. He was upset that he was not able to have his telephone number on his vehicle which was an aspect of his lack of freedom and affected his ability to grow his business. This is a common pleaded breach.

(b) The Second Claimant: Mr Hayward

90. The specific allegations in respect of Mr Hayward were first an allegation about the taxman and second the refusal to allow him to publicise his name or his telephone number on the car, both allegations being considered elsewhere in this judgment.

91. Mr Hayward has given evidence about what he regarded as the intimidation of Mr Benson. Some of this has been referred to above in that context. He signed a 60 month contract on his first meeting with Mr Beck, being told that it was a really good deal. In fact, he did not realise that the 60 months was after the initial training phase, and he did

not appreciate that the franchise fee would rise appreciably each year. He signed a second contract in 2018 because he could not afford the payments under the first contract.

92. On 23 March 2020, the day of the start of the national lockdown, he said that he wanted to exit, saying that it was making him very stressed and affecting his heart condition and his sleep. He asked for a suitable outcome, even although he recognised a big cost to him. The response was that it would cost him over £122,000, and that this would be *"likely to be financially disastrous to you and your family"*. Whatever the exact sum, and there are arguments about that, the very large size reflected the fact that, by that time, he was signed up to a ten -year agreement. This account in one sense confirms how Covid was a trigger to the terminations, but it also provides the context in which the breaches relating to Covid have to be judged. They comprised the refusal until 24 March 2020 to make any accommodation for Covid, and thereafter to use the problems of Covid as an opportunity to seek unilaterally to extend the agreements.

93. I found Mr Hayward to be a man of few words. He was not very comfortable with matters of detail, not because he was dissembling, but because dealing with documents and specific events was well outside his comfort zone. A witness like Mr Hayward is a good example of why there is concern about the practice of concluding long-term franchise agreements without independent advice. Mr Hayward, as were other franchisees relative to JBL and Mr Benson, disadvantaged and vulnerable.

(c) The Third Claimant: Mr Monk

94. The additional allegations are as follows:

(i) Mr Benson shouted at him on a training day in front of other instructors for having a roof cone installed wrongly and humiliated him;

(ii) Mr Monk witnessed Mr Benson giving tuition to instructors using another person's licence after his own had been revoked;

(iii) Monk had no choice as to the publicity materials on his car for the supplier to provide them but had to use JBL's nominated supplier.

95. I found Mr Monk to be a weak witness. He avoided confrontation and easily and meekly agreed to matters put to him. An unsatisfactory feature of his evidence was that he was unable to substantiate several areas of criticism of JBL in his evidence.

96. I accept that the first of those allegations is proved. It is denied by JBL. There was a technical breach of the rules, but it did not merit the reaction which it got. I accept Mr Monk's evidence that Mr Benson berated Mr Monk in front of others shouting that he should be ashamed of himself.

97. As regards the second of the allegations, Mr Benson says that when his licence was revoked, he would help to supervise staff trainers during mini-bus days without any remuneration. No breach has been proved, albeit that, as in the case of Mr Ellis, it

incited suspicion for Mr Benson to be involved in giving driving instruction whether because any payment was made to a third party or there was no payment made at all.

98. As regards the third allegation, I find that this did not amount to a breach of contract. There was no nominated supplier: JBL contracted with the signwriter. There was nothing wrong with doing it that way: it promoted uniformity.

99. Mr Monk gave evidence which resonated with a lot of the evidence in this case. He said how he felt pressurised to sign the first agreement: he was not allowed to take it away. He believed that it was a three-year agreement, but the agreement was for longer and it was difficult to work out how long it lasted. He complained about how the weekly fees increased but the price for lessons did not. He stated how inappropriate a lot of Mr Benson's Facebook posts were e.g. an offensive remark about a Chinese franchisee. He heard Mr Benson being unable to control his temper, being angry and rude and acting as a bully and intimidating people. He felt shouted at and belittled and made to feel inferior.

(d) The Fifth Claimant: Mr Robins

100. The additional allegations in respect of Mr Robins were as follows:

(i) Mr Benson threatened to sue him for £60,000 for having failed to pass the various exams required to become a driving instructor;

(ii) Mr Benson told him that he was required to extend his franchise agreement and to commit to a further 50 hours of training;

(iii) after informing JBL that he was suffering from mental health problems, he was issued with a franchise agreement which contained a clause that he would be liable to pay franchise fees even if he became unable by reason of physical or mental health to give driving lessons;

(iv) Mr Benson encouraged him to refer to himself as an instructor contrary to section 135 of the Road Traffic Act 1988.

101. These allegations were answered in the Defence in that:

(i) at a meeting prior to the third attempt at the Part 3 exam, Mr Benson said that if he failed, he would not come to him and say that he owed him £60,000 but they would work out a way for him to be retained again with three months off. It was mentioned in a tape of a meeting of 6 February 2020 reviewing a way ahead, but not in the terms of a threat to sue for £60,000. Mr Robins has not provided any details about this allegation in his evidence. I find that there is no evidence on which to find the allegation proved.

(ii) It is said that Mr Benson did not say that Mr Robins would be required to extend his agreement, but the agreement would be suspended and he would be required to take 40 hours of part three training. In a meeting on 14 September 2020, there

was discussion as to how Mr Robins would train again. I find that the second allegation has not been made out on the evidence.

(iii) The clause referring to mental illness was not included due to Mr Robins' problems but had become a standard clause of JBL by that time. I find that that is correct and there was no breach of contract simply by the then current clause being included in the contract. The third allegation is not proved.

(iv) This allegation is denied. After Mr Robins had passed his part 2 test, he was entitled to refer to himself as a trainee instructor or a "PDI". There may have been a misunderstanding about what Mr Robins was entitled to call him, but the fourth allegation is not proved as a breach of contract.

102. None of the specific allegations were proved. That is not to say that Mr Robins was seeking to mislead. His evidence resonated with much of the evidence in the case, adding to the picture of disadvantage and vulnerability of franchisees. In his evidence, Mr Robins stated that the agreement had been presented to him in an envelope. He was not allowed to take the contract away until he had signed it. He felt under pressure to sign because Mr Beck said that he could not train until he had done so.

103. He said that when he failed Part 3 for the second time, Mr Benson said that he was probably one of the worst instructors he had ever had.

104. He said in the context of not passing that he was offered "a deal" by Mr Benson which was a new longer agreement with another start-up period. He said that he had no choice other than to sign the agreement because he was trapped by the payment.

105. He said that he did not have a full diary despite what he believed he would get. He was not permitted to promote his own business. He was not allowed to put his number on his car or advertise himself. He was upset about an incident when he said *"Good morning"* to Mr Benson outside his office door, there was a very short conversation and he then received a letter dated 1 August 2019 saying that he should not come into the office of Mr Benson without an appointment. I accept this evidence. It was sought to be justified because Mr Benson was so busy and needed to be protected in this way. In fact, it was unnecessary, insensitive and controlling.

(e) The Sixth Claimant: Ms Rusted

106. I formed the view that Ms Rusted gave her evidence in a measured and thoughtful way. She was patently an honest witness, albeit that she recognised that her precise recollection of the order of events was not good. She got confused on points of detail such as her assertion that the franchise fee had gone up to £300 per week at the start of her 10 year franchise agreement when it was more likely that this was a projection forwards perhaps to the end of her existing 5 year agreement. I did not find that such points of detail affected her overall reliability, particularly about witnessing bullying or herself being driven to tears.

107. There were seven allegations specific to Ms Rusted as follows:

(i) witnessing abusive and aggressive behaviour by Mr Benson towards female staff, specifically Ciera Rodgers who he shouted at in front of other members of staff calling her *"f***ing stupid".*

(ii) abusive and aggressive behaviour by Mr Benson towards her whilst giving 1-to-1 tuition;

(iii) being reduced to tears by Mr Benson and Paul Beck when they demanded that she pay for training days she was unable to attend, having given notice of absence due to severe back pain;

(iv) being required to extend her franchise agreement from five years to 10 years when she told Mr Benson that she could not afford the franchise fees;

(v) witnessing Mr Benson advising trainees and instructors how to evade tax and to *"keep one diary for the tax man and the other for what really happens";*

(vi) hearing Mr Benson make reference to an offensive word for a homosexual referred to in the Particulars of Claim;

(vii) being publicly criticised and removed from the Just Benson group after asking about JBL's position on the instructor's inability to trade as a result of COVID-19.

108. As regards, the first allegation, Mr Benson denies using such language or upsetting Ms Rodgers. There was jovial shouting at the office, but she gave back as good as she got. She had rented a property from Mr Benson in Portugal and went on a work holiday with colleagues organised by Mr Benson. I do not accept this denial. I prefer the evidence of Ms Rusted who gave evidence at para. 30 of her witness statement that she was waiting by the door in the office in the reception area and could hear Mr Benson screaming at someone down the corridor saying *"F*** off out of my office, you stupid cow."* She saw Ciera walk out and she shrugged her shoulders and put her head down and carried on. This evidence was corroborated by Ms George at para 21 who said that a few months after her first training day, Mr Benson was shouting and swearing at two office girls Ciera and Wendy whom he told to *"F*** off and go away"*, picked up their bags and coats and walked out. They looked grey and weary. Ms Rusted found the experience was upsetting. In cross-examination, she said that she thought that she would be the next one.

109. There was evidence from Wendy Smith, a former partner of Mr Benson, saying that Mr Benson got on very well with Kiera and in oral evidence, she did not accept that this occurred.

110. I have considered the analysis of JBL. First, it is said that no date was given and it is likely that it may have been at a time of stress before the criminal trial in 2015, but this is not an answer because it was before Ms Rusted and Ms George became franchisees. Second, the words reported in Ms Rusted's witness statement are not the same as the

pleaded words: that does not undermine the account. In both accounts, the "F" word was used in the same sentence as the word "stupid". In Ms George's account the "F" word was used without the word "stupid." I find either that such words were used. It is possible that this was the same incident or a separate incident, but it matters not for the purpose of this action. It is evidence of aggressive and abusive behaviour. Third, it is said that such an incident not directed to the franchisee cannot be a breach of the franchisee's contract. I disagree. It was a part of the intimidatory atmosphere and bullying conduct of Mr Benson which is the subject of so much evidence and is to be seen as a part of an overall picture which was in breach of the implied terms of good faith.

111. As regards the second allegation of abusive and aggressive behaviour during driving tuition: this is denied by Mr Benson, and he prayed in aid the fact that subsequently she entered to a franchise agreement and would recommend the training of Mr Benson. She says that thereafter she had excellent tuition from Ms Summers and that it was to her and Mr Williams that her praise was directed, mentioning Mr Benson as "sound" and "giving up his time". There is evidence from Ms Thornton that there was an occasion when Mr Benson reduced her and Ms Rusted to tears. Ms Thornton's evidence was that Mr Benson would raise his voice and shout at her. She told Mr Benson that she learned from being told where she had gone wrong and not from being shouted at. She told him that he was a bully, and he said that he did not care. Whilst Ms Thornton was not mentioned by Ms Rusted, I accept her evidence. Ms Rusted has an account of being made very upset by similar behaviour. I accept the submission that such breaches are evidence of aggressive and abusive conduct which persisted thereafter in the various ways described in this judgment.

112. The third allegation was that she was required to pay for a training session which she was unable to attend due to back pain. The forensic point was that she said orally that she was reduced to tears, whereas in her statement she referred to being in agony due to her laser surgery and being "very upset", and it being "really upsetting" due to the lack of empathy about her predicament. I am satisfied that her account was honest and accurate and that the account does not stand or fall by whether there were actually tears. This is not a trivial allegation. It was deeply uncaring: it comes over that the money to the trainer was treated as more important than the physical and mental well-being of Ms Rusted. It is a better point that it was a stale allegation, but here too, it was a part of a culture of lack of compassion in which the financial interests of JBL and those associated with it were elevated over basic sensitivity to franchisees. It was therefore a part of a continuing culture in which this was manifested in different ways.

113. The fourth allegation is a pleaded allegation of how for numerous franchisees, the business model of JBL may not have worked in that so many of them were unable to pay. The consequence is that even if the lower payments were generous, Ms Rusted became involved in a 10 -year arrangement instead of a 5 -year arrangement, thereby affecting her freedom of labour. Having said that, Mr Benson has demonstrated in para. 162 of his witness statement that he decreased her fees including that she did not have to pay any franchise fees in her last three years.

114. The fifth allegation about advice to evade tax is considered generically elsewhere. The sixth allegation that Ms Rusted heard Mr Benson use a homophobic word is not supported by evidence.

115. The seventh allegation about being blocked on Facebook actually occurred in June 2020 rather than earlier during Covid. As will be noted below, in June 2020, Ms Rusted took exception to a remark about an instruction with a brain cell. This in turn led to Mr Benson removing her from Facebook because of her *"unreasonable behaviour and potentially trouble causing comments and remarks."* She would be returned if she gave an assurance that she would not make similar remarks again. On 11 June 2020, Ms Rusted said to Mr Benson that she could not believe that she was blocked and they should be able to have a decent discussion instead of his getting angry all the time. She said that she was not attacking him, but questioning the rules of the government and *"it did pee me off about the brain cell comment."*

116. It is not an answer to say that being on Facebook was not a contractual right. Whether it was or it was not, to allow someone access to Facebook and then to remove them because she took exception to the brain cell remark was part of an unreasonably domineering environment. Contrary to the evidence of Mr Benson that there was no business benefit to being part of Just Benson, franchisees were entitled to take the view that access to the Just Benson Facebook was of importance in order for their better performance of their obligations as franchisee. Ms Rusted was unreasonably blocked. It is not an answer that not all franchisees looked at the Facebook group. Nor is it an answer if the allegation was misdated by saying that it occurred in March 2020 when in fact it occurred in June 2020. That it occurred was uncontroversial.

(f) The Seventh Claimant: Mr Stubbings

117. Mr Stubbings gave evidence about how he was persuaded to become a franchisee. He did not realise when he signed a 60 month agreement that that period would not start to run until he became a qualified instructor. He gave evidence of intimidatory conduct. This included on a bus day bringing Mr Stubbings to the front imagining that he was a pupil and shouting at him in front of all the people on the bus. The fees became disproportionate to what he was earning. By 2020, he was struggling with weekly payments and he was offered an extended agreement of 10 years. He knew that other people had been asked to sign up to 10 year agreements and this seemed like a trap to him. When Mr Benson said that he would be extending the term of his contract he did not agree to this and he did not want to be tied to JBL any longer.

118. The additional allegations as regards Mr Stubbings are as follows:

(i) A letter sent by Mr Benson to him on 18 June 2018 urging the recruitment of additional instructors in Haverhill in which he and seven other franchisees were already providing services;

(ii) Being told in the same letter not to have friends among driving instructors from other driving schools;

(iii) Being insulted by Mr Benson for ruining a promotional photograph by his clothing;

(iv) Witnessing Mr Benson aggressive insulting a trainee called Dan Laughlin immediately before his test.

119. As regards the first of the allegations, this was a strategy on the part of Mr Benson to neutralise the threat of a competitor driving school getting into the market in Haverhill. Four of the Claimants in this action operated in the Haverhill area. Mr Stubbings already felt that he did not have enough work and at the attempt to recruit more from Haverhill was unreasonable, and that the suggestion the market could be flooded by JBL was ridiculous. Any consultation with franchisees through a meeting which was convened was simply to convey a message rather than to take soundings. The allegation is that this was being done in order to put pressure on a competitor about coming into the area rather than having any regard for the franchisees who were already under financial pressure. Whilst the complaint is understood, there is not before the Court sufficient information regarding the market in Haverhill and the work available for the franchisees in that area. In order for a possible breach of an implied term to be established, it would have required much more detailed facts to show how JBL had deprived the Claimants from obtaining benefits granted and/or undermine the terms of the bargain and or in some other way acted in breach of a duty of good faith. The agreement did not contain any right to exclusivity in Haverhill or any express right to decide whether or not to recruit in Haverhill. Although this first of the allegations may be seen as a part of a course of conduct of failing to be attentive to the concerns of the franchisees, it has not been proved.

120. As regards the second of the allegations, I find that this is not a breach of contract in that it was intended to refer to Facebook friends, and JBL wishing the internal plans of the Benson School not to be shared with other schools.

121. As regards the third of the allegations, the franchise agreement did contain a dress code, but that did not mean that it could be enforced abusively. Mr Stubbings had attended a photographic shoot with a polo shirt which had been allowed previously without criticism. If it was a problem, he could have gone home and changed it without delaying the shoot. Instead, he received a letter from Mr Benson, stating *"your dress code on this day was appalling and it doesn't matter how cool you think you look."* Mr Stubbings believed that this was bullying conduct. It was abusive and disrespectful. It was a part of the intimidatory and aggressive conduct of Mr Benson and not justified by clause 5(q) of his franchise agreement. Mr Ellis commented on this behaviour (para.17 of his witness statement): it made him nervous when Mr Benson wanted him to wear formal trousers which was unrealistic in his work as a trailer trainer.

122. As regards the fourth of the allegations, I am satisfied that Mr Stubbings witnessed Mr Laughlin being insulted by Mr Benson on the bus over a long period with swear words being used. He later found out that this occurred on the day before Mr Laughlin's Part 3 test. I do not accept the denial. It was memorable to Mr Stubbings and it was consistent with Mr Benson's other conduct.

(g) The Eighth Claimant: Ms Summers

123. Ms Summers made additional allegations about requiring cash which will be considered generically in connection with taxation matters. She also complained about *"JBL's chaotic communications policy under which the instructors were applied to the telephone the office but not allowed to let the phone ring more than three times at risk of sanction"*. This was a rule that caused real difficulties because she had to put down

the phone instead of making contact between her lessons, and occasionally by the time that she was able to telephone again it was after office hours.

124. It may be that this system was inadequate, but in the context of an allegation of a breach of an implied term of good faith, an inadequate system by itself was not necessarily a breach of contract. The point was the risk of sanction and the way in which that was expressed. Mr Benson posted to the Just Benson page:

> "If the instructor phone in line rings more than three times HANG UP!
>
> Any more of this selfish behaviour and I will block offending instructor's numbers and you'll have to call in to the office to update your diaries."

125. In the Defence (para. 10 H(iii)), JBL says that this was not a threat of sanction but a warning and that it was effective. It was a threat of sanction because then the instructor would be unable to contact head office without having to go there which might be a very long distance from their area. It was also written in intimidatory and unpleasant language and is part of a course of conduct of other intimidatory and abusive behaviour. The fact that it may have been effective in the limited ambit of its objective misses the point about the objectionable manner in which Mr Benson made his point.

126. Ms Summers gave evidence that she was too afraid of Mr Benson not to do what he wanted. She regretted helping Mr Benson sign on new franchisees, knowing that it would be a disaster for them personally, but being too scared not to do as he said. When she did stand up to him in the lead up to the lockdown, as appears elsewhere, she was removed from Facebook.

(h) The Ninth Claimant: Mr Szatkowski

127. The additional allegations of Mr Szatkowski comprised:

(i) stigma caused by Mr Benson's firearms conviction leading to cancellations by two pupils in 2019;

(ii) refusal of request for him to drive a Mercedes A class car in February 2020;

(iii) the racist, sexist and homophobic statements indicating that Mr Benson would be prejudiced against non-UK instructors.

128. As regards the first allegation, the Court does not doubt the information about the cancellations and no doubt the firearms conviction did cause some ongoing damage to the brand. However, it was not comparable to the stigma of the widespread corruption of BCCI referred to in *BCCI v Malik*. I am not satisfied that as of 2020, the stigma was so great that it amounted to a continuing breach of any implied term of trust and

confidence. If and to the extent that it had previously amounted to a breach at least vis-à-vis instructors at the time of the conviction and in the period thereafter, it was so long ago that it has not been shown to be a basis for terminating in late 2020.

129. As regards the second allegation, it would have been disappointing for Mr Szatkowski not to be able to drive a vehicle which may have been superior to the recommended vehicles. It would also have been inconvenient to him, given that he was able to get a good deal on it. That said, I am not satisfied that it was so unreasonable of JBL to refuse the request as to give rise to a breach of an implied term. JBL was given a right under the contract to approve or decline a choice of car, and the insistence on having a brand confined to a number of cars does not appear to be an arbitrary or capricious act or something so unreasonable as amounting to a breach of the implied term of good faith.

130. As regards the third allegation, there was no evidence of overt racism to Mr Szatkowski, but the incidents of which he had knowledge (e.g. about the Chinese instructor) did cause him to believe that Mr Benson was prejudiced against non-UK instructors. That is simply a tangible reason why racism within the workplace had a knock-on effect not limited to the person who was the subject of the racist comments.

131. In addition to this, Mr Szatkowski gave evidence that when he signed his second contract in February 2019, he could not understand it all because he was not fluent in English. He and his guarantor, Joanna Bernat, asked if they could take the agreement home, but were told that they could not, and if they did not sign there and then, Mr Beck could not guarantee that the offer would still be available. At the time of signing, he was desperate for work.

132. He also described how he struggled for new pupils and how he was given leads sometimes 20 miles away from his home. When he refused leads in areas far away from Peterborough, he was given less or no leads in Peterborough which he felt was a punishment. He wanted to be able to advertise his mobile number on the car, but this was refused.

133. He said how alongside many other instructions, he found Mr Benson rude, disrespectful and threatening. He heard of the troubles that instructors had when they sought to stand up to Mr Benson.

134. I accept that he was a truthful witness who gave consistent testimony. The fact that the Court did not accept the stigma claim as a basis for termination or the claim for not being able to use the Mercedes Class A as founding a breach of contract does not affect the fact that the Court was able to accept the truth of his evidence.

(i) The Tenth Claimant: Mr Chapman

135. The additional pleaded allegation is that Mr Chapman was put under pressure to publicise other instructors when he was unable to pass his training. He felt so trapped by the agreement that he became suicidal and was prescribed antidepressants. The defence of JBL was that Mr Chapman was encouraged to engage in publicity for the benefit of the brand. He was not put under pressure to publicise other instructors.

136. His evidence was a very sorry account about the business model not working for him. He was put under pressure to sign the agreement. His repeated failures of the tests led to him being on anti-depressants. He did not have enough work and did not have the opportunities which would come if he was able to market for himself e.g. having his number on the car and setting his own rate. He felt unable to raise his concerns because he had heard stories of how Mr Benson reacted to those who tried to make the franchise their own business. He felt trapped and on one occasion broke down in tears in front of the other trainees on a training day.

137. Mr Chapman called Mr Benson to tell him that he was suicidal, on antidepressants and he wanted to get out of his contract. In the course of a few conversations, Mr Benson said that this would cost £81,000, but he offered a sum of £40,000 to be "generous". Mr Chapman did come back to him saying that he could not afford this with a young family and a mortgage. He said that he would just carry on: he felt that he did not have a choice. Mr Chapman felt that Mr Benson did not care.

138. Mr Chapman said that he came to a state of feeling trapped and being in despair. He felt so stressed by everything at JBL. One on occasion, he broke down in front of all the other trainees. He described graphically how he had *"jumped out of the fire"* at his previous employer into *"a pit of hell at Bensons."* (witness statement at para. 22)

(j) The Eleventh Claimant: Ms Newell/Cherry

139. The additional allegations on the part of Ms Newell are as follows:

(i) being pressurised to extend her franchise agreement by 10 years after failing to pass her standard check and being unable to pay franchise fees, knowing that she would face a claim for more than £100,000 if she did not agree to do so;

(ii) derogatory comments by Andy Court, a trainer employed by JBL about homosexuals.

140. The context of the first additional allegation is the evidence of Ms Newell, namely that she was rushed into signing the agreement by Mr Beck, thinking that she could read it at home. By that time, it was too late. She then realised that it would be a long and difficult process to qualify which would be added to the term of her franchise agreement. In the event it was a period of 21 months from signing the franchise agreement to getting her ADI licence. The consequence was that she signed 3 franchise agreements because of being unable to afford the franchise fees in the first and second agreements.

141. She says that she signed the third agreement because she was told to do so by Mr Benson and that she knew that she would be taken to court if she did not. He often spoke about taking houses and bankrupting people. On one occasion, he told her and her father, her guarantor, that he would see us in court.

142. The consequence is that on 26 November 2019. Ms Newell signed a 13 year agreement. She felt scared. What has now happened is that the counterclaim in her case is more or

less than a sum of £300,000. Whilst quantum is for a later stage, this extraordinary consequence of a vulnerable person entering into these contracts and ending up with a contract for a period that is inexplicable results from the first of the above allegations.

143. The Defence is that Ms Newell entered into an agreement for a minimum term of 13 years on 15 May 2017 in circumstances which were "entirely her choice". It is also said that there was a minimum term previously of 10 years and so the extension in the third agreement was relatively small. The closing submissions of JBL are that there cannot be a breach of contract in that the pre-contractual conduct cannot constitute a breach or a repudiatory breach of an agreement justifying its discharge. If the submission is correct, then the consequence might be that the breach of contract was of the prior agreements which were being terminated. In fact, this has no practical consequence.

144. The circumstances in which Ms Newell had got herself into this situation by the second agreement and adopted again by the third agreement speak about a level of power enjoyed by JBL over Ms Newell. It speaks volumes about the nature of the relationship between franchisor and franchisee. It was not "entirely her choice." There was an inequality of bargaining power. She became subjected to a regime in a contract which was never going to work and in which her interests were relegated to those of JBL. She felt trapped by the extended contracts. She was still on anti-depressants because of her experience at JBL.

145. Even assuming that this was not a breach of contract, but a part of the business model, and even if long contracts were something contemplated by the terms of the agreements, they provide a context. It is a context in which the many alleged breaches in this case between Ms Newell and JBL and between the Claimants generally and JBL are to be judged.

146. Ms Newell referred to numerous incidents of intimidatory conduct. She said (para. 21 of her witness statement) that when she failed her standards check, Mr Benson posted this on Facebook. She felt mocked in front of the other instructors. She said that she could no longer be a driving instructor because it affected her mental health.

147. The second allegation about Mr Court was not proved because it did not form a part of the evidence of Ms Newell. That said, I accept the evidence of Mr Dean about a homophobic remark of Mr Court and homophobia more generally, as set out in the section where I consider the evidence of Mr Court.

148. There is an application on behalf of the Claimants to amend the Particulars of Claim as regards Ms Newell. I accept that it is a late amendment, but I do not accept that it is a case of a party "mucking around" the other side. In part, it is to correct the error in her evidence about the extension to 10 years occurring in May 2017 in the second agreement and in the third agreement. There is a further particular about the place where homophobic remarks were said to have taken place. The only new matter was an allegation about the failure to have a trainer to assist in requalification.

149. I am not prepared to allow the last allegation about the failure to have a trainer because there has been insufficient evidence to prove that Ms Newell asked for a new trainer, her trainer up to that point having been Ms Summers. If, in fact, the amendment should

have been allowed, I should have found that the allegation was not proved for the same reason. Save for that amendment, the other amendments are allowed.

(k) The Twelfth Claimant: Mr Dzierzanowski

150. The only additional allegation was having no choice as to the model or colour of the car in which he gave lessons. His evidence was that he wished to have a bigger vehicle because of his back and scoliosis around the shoulders. He had no cooperation and no help. When he sought assistance from JBL staff, he received a letter from Mr Benson saying that he was abusing staff. The complaint was that his circumstances were not being taken into account, and that the requirement to have uniformity of colour and model was treating the franchisees as employees.

151. JBL denies that a complaint was made about the model and colour of car. There is a letter in the papers from Mr Benson dated 22 January 2020 which does not evidence the complaint, and there is no other document evidencing the same. That letter censured him for "foul language" of the kind which franchisees had complained of coming from Mr Benson.

152. I found that Mr Dzierzanowski's evidence lacked clarity and may have been affected by how palpable his feelings of mistreatment were. He gave very few dates, and did not come over as having a clear recollection. Having regard to the absence of documentary record and my assessment of Mr Dzierzanowski's evidence, I have not found the specific allegation proved.

153. That said, much of his evidence resonated with other evidence in this case. He gave evidence of signing the first agreement and of not understanding the duration of the agreement that the minimum period was additional to the training period. His second contract was because he could not afford to make the payments under his first contract. He gave evidence about how controlling Mr Benson was with students, in particular how the roof cone broke and he received a call telling him off about driving without a roof cone. He was not allowed to have his phone number on his car. He was upset about the remarks about the Chinese instructor who was a friend. He felt that he was being deliberately delayed from taking the test for the next stage of his qualification. After being told that he was not ready, he passed with the highest score bracket.

154. He was also upset about conversations about Poland and its culture, and particularly being told a Polish swear word by Mr Benson, which he did not appreciate. Mr Benson denied that he knew the word. There was a remark about Polish people coming and taking jobs which he found particularly disrespectful. Although he found this insulting to Poland and Polish people, he did recognise that a part of the publicity of JBL was that they taught in Polish and he was encouraged to speak in Polish. Whilst everything depends on context, It is possible that there was a reference to the word, but I am not satisfied that its mention was a breach of contract. This incident says more about the general concerns about racist, sexist and homophobic conduct amounting to breaches of contract (as found below), rather than about the particular discussion, if there was one, about a Polish word.

155. Mr Dzierzanowski was upset about the initial failure to reduce fees due to the onset of COVID. Thereafter, he said that the decision to extend the contract by the number of COVID lockdown weeks was made by Mr Benson and without his consent. In the end, he terminated because of the way in which he had been treated. He said that the majority of people had not had a good relationship with Mr Benson.

(l) The Thirteenth Claimant: Ms George

156. The particular allegations made by Ms George are as follows:

(i) being told by Wendy Smith but she was not permitted to advertise her business in the local paper;

(ii) being told by Mr Benson after she said that she was suffering from severe back pain that she should have got health insurance to cover her franchise fees;

(iii) being misled by Mr Benson and Mr Beck into signing a new franchise agreement that did not provide her with the saving she had been promised.

157. Ms George knew the case well. She gave her evidence well. She was not intimidated by any of the questions. In respect of the first allegation, Ms George's evidence in respect of the first allegation is that she wanted to advertise in a local magazine but went to 15,000 homes in South Woodham, but Wendy Smith said that she could not do that because all advertising was to be controlled by the office. JBL says that this is not proved by documentary evidence, and Wendy Smith had no recollection. It was also said that it was not prevented by the agreement. I am satisfied that there was a request and it was prohibited by Wendy Smith. It was said that the experience was that it did not work, but the system of JBL would have been that any such advertising would not have been personalised to Ms George, and so she would not necessarily have had any referrals. I am satisfied that it was a breach of contract in that she was prevented from doing something which, even on JBL's case, she was able to do. This was all part of controlling behaviour.

158. In her evidence, Ms George said that she felt pressurised to sign the first contract. Mr Beck refused to allow her to take away the agreement from the premises and did not explain the contract to her, which felt like a hard sell. She then signed a second agreement at a time when she was having issues with her back and other health issues. She then received a letter from Mr Benson saying that she should have got sickness and accident insurance. He repeated that at a meeting and told her that she would still be liable for the franchise fees under the first agreement. She signed the second contract feeling that she had no alternative other than to sign the second contract because she could not afford the weekly payments. This is her evidence in respect of the second allegation.

159. There is no issue that there was a reference to health insurance. It is an answer that there was a contractual requirement about insurance. Whilst no breach is proven, she was in a predicament from the nature of the system of JBL which involved ending up

in an unsuitable contract which she did not understand when she entered into the agreement and where she was left with no alternative other than to enter into another and longer second agreement. There is no indication of sympathy to her predicament, although the second allegation does not give rise to a specific breach of contract.

160. In respect of the third allegation, Ms George signed a third contract because Mr Beck told her that if she got her own vehicle, she would save a considerable amount on franchise fees each week. In fact, it turned out that it cost her far more under the third contract. She said that they had lied to her, but no separate claim is made for misrepresentation respect to the third contract. The answer which is provided is that this would have been a complaint about pre-contract behaviour. Further, it is said that the additional fees were because of the costs of hiring a car. Here too, an additional breach of contract is not proven, but Ms George was locked into a contractual relationship within which the other allegations of breach of contract have to be assessed.

161. She said that Mr Benson controlled the franchisees: she could not have the car she wanted; she could not wear the clothes she wanted she could not advertise where she wanted to do; and she always operated outside her area which was costly. They had to deliver leaflets that had office numbers and which were miles outside her area. The bus days involved travelling for about an hour. She referred to Mr Benson's behaviour as being aggressive and swearing, intimidating and unapproachable (para. 19 of her witness statement). She tried to avoid meeting Mr Benson face-to-face because she was scared of him.

(m)The Fifteenth Claimant: Mr Maples

162. The sole additional allegation in respect of Mr Maples is that he was required to sign a new franchise agreement with extended terms having not qualified as a driving instructor after Mr Benson was informed about his divorce and his bankruptcy.

163. The evidence of Mr Maples is that he entered into his first agreement in a very informal way and without legal representation. When he had still not qualified, he was in difficulty about paying his franchise fees whereupon it was suggested that he signed a new contract which was for a much longer term than his first contract. He signed that contract because he believed he had no option in order to keep his weekly fees under control.

164. JBL's answer to this is that, if anything, this was a pre-contractual representation and therefore not giving rise to a breach of contract. In any event Mr Maples entered into the agreement because he needed to qualify and he was given the breathing space required. It was also said in the defence that JBL did not know about his divorce and bankruptcy until a later stage in early 2020. Whilst no allegation of specific breach is proven, this is another instance of a person having entered into an agreement without adequate opportunity to consider it and then being locked into a situation where there was no alternative other than to sign an agreement for a longer period of time. Whilst no breach of contract specific to Mr Maples has been proved, these are the circumstances against which the other allegations of breach of contract have to be assessed.

(n) The Sixteenth Claimant: Ms Newman

165. The additional allegations are as follows:

(i) Mr Benson said at a time when Ms Newman was unable to work through illness and faced eviction that JBL would take her guarantor's house and get every penny and if her house did not cover it, it would come back for more. The allegation is that that was to take place if she did not extend her franchise agreement by five years.

(ii) When intimating that she had considered suicide, she was asked by Mr Benson *"you've got life insurance, haven't you?"*

(iii) Mr Benson expressed his dislike of Indian pupils *"leaving the cars smelling like curry"*;

(iv) Ms Newman paid £5000 for a car which she later found out had been written off by insurers after an accident.

166. As regards the first allegation, on the basis of the witness statement of Ms Newman, this does not appear to have been by reference to the extension of a franchise agreement but in the context of a meeting about an inability to pay. The witness statement does refer to correspondence in January 2018 when Ms Newman wanted a way out and "to save my very good friend and guarantor from losing her house because I cannot pay the current amount of weekly fee payable", Mr Benson responded on 22 January 2018. He offered to extend the agreement by an additional 3 years (so that it would continue until April 2026). She was given 7 days to agree, failing which proceedings would be likely to follow against her as first defendant and her guarantor as second defendant. A judgment would follow and if not paid, a charging order would be applied for against the guarantor's home and then there would be an order for sale. The new agreement followed. This was not the same incident as pleaded in the Particulars of Claim, but it was no difference in substance from the alleged breach of contract This was the business method of JBL and this was how the extension was procured. Mr Benson said that the letter was not a threat of the consequences of not having a longer agreement, but it was an offer which Ms Newman could accept or refuse.

167. As regards the second allegation, in a recorded interview, there is a reference to life insurance but not having the intimidatory context contained in the pleaded allegation. I do accept that Ms Newman did tell Mr Benson about her physical and mental health difficulties and about being upset about everybody being put at risk, and how she could not provide for her family or pay the rent because of the franchise fees. It is possible that, in that context, there was a reference to life insurance. She said at para. 21 of her witness statement how she felt suicidal and that Mr Benson turned off his recording machine and said that *"you've got life insurance, haven't you?"* I accept that there may have been an inappropriate reference to life insurance and that Mr Benson was probably insensitive to Ms Newman's mental health difficulties. However, I am not so satisfied by the evidence that I am able to find the second allegation proven on the balance of probabilities or that the machine was turned off. It should be added that there was an allegation that there had been many more recorded interviews which had not been

produced on disclosure. The answer given was that no interviews had been withheld, and sometimes interviews must have been recorded over. Whilst this shows a chaotic approach to preservation of documents, I do not find proved that this was a deliberate attempt at concealment. I bear in mind the instances of preserved recordings which evidence the Claimants' case about aggressive and intimidatory conduct.

168. In the course of the interview close to the time when Ms Newman says that Mr Benson switched off the recording, the interview contains the following passages:

> "JN: because they've had a bad experience with Benson-
>
> JB [Interrupting] They haven't had a bad experience, they've fallen into arrears, they've put two fingers up at me, they've ended up in court, some of them have lost their houses, that's how it works, they enter the agreement with me, they don't honour the agreement.
>
> "JB:…this is getting ridiculous. So can we just calm down a little bit? If we are going to move forward, let's do it nicely. Because the nasty way is just to say, let's finish the meeting now and I'll give the matter to the solicitor. Now do you honestly think I want to do that? I'm looking you straight in the eyes now.
>
> JN: No, I don't want to do that either.
>
> JB: Well, it's not up to you, it's up to me."

169. Mr Benson's evidence is that Ms Newman was forthright in that conversation. That short extract contains intimidatory language of the kind attributed to Mr Benson, that is to say threatening the use of a solicitor which in context meant legal action and saying that it was up to him and not her when she said that she did not want legal proceedings.

170. Ms Newman in her oral evidence referred to a continued barrage of nastiness that Mr Benson would sue her if she did not pay. She felt trapped. There was no way out once the agreement had been signed. It was a dictatorship. There was control. She had to work to pay the fees. There was full control over work strategy, over not being able to advertise for herself on the car, everything having to go through the office.

171. As regards the third allegation, I am satisfied that this comment was made at least in respect of one pupil who may have been of Indian heritage. It is a lame answer of JBL to distinguish between whether the comment was made of all pupils of Indian heritage or only one. Either way, it was an unpleasant and denigrating remark which could fairly be construed as showing a dislike to people of Indian heritage. That was consistent with Mr Benson's other racist and sexist remarks.

172. As regards the fourth allegation, JBL says that the vehicle was supplied was capable of use and is apparently still being used. There is not sufficient evidence before the Court to prove this allegation.

173. Ms Newman said as regards her first agreement that she asked if she could have the document seen by a legal person but was told that that was not possible and that she had to sign it if she wants to continue training and her guarantor need to needed to sign it as well. The information about how long the agreement was to be was not made clear to her.

174. She gave evidence about signing a second and a third agreement eventually extending her period to around ten years in circumstances where she fell behind with payments needed to lower her fees. At the same time there was no offer of extra advertising or help. She felt that everything in the business was dictated to her by Mr Benson, not using her own phone number for advertising, not having her contact number on her car and being dictated to as to how much she could charge. There were numerous rules with sanctions if there was not compliance.

175. Ms Newman said that she did not have a problem with the terms of the agreement but with everything which went with it and being dictated to. She said that it all sounds great on paper but the net tightens on you. She felt under the cosh all the time. Sitting in a chair in Mr Benson's office at a lower level to him felt like being in a dungeon. She said that she could see a cheque behind him on the wall and he told her that this was from a court case and this is what happens to people who do not pay. He told her a few times that other instructors were sued. He was saying to herself and her partner and guarantor that that was how he made his money suing and taking people's houses. She said in re- examination that Mr Benson can portray himself as a funny man, but when asking for help, he does not give help. It is difficult to explain unless one has seen his looks. She terminated because of him and his behaviour.

176. Ms Newman said that she left because of Mr Benson's behaviour. She could not take any more threats she referred to his behaviour just before lockdown. After COVID, she could not take anymore.

177. Although I do not accept every detail of her evidence and find that she may have been mistaken in details, I do accept the general thrust of her evidence and of her account of her own feelings caused by Mr Benson's conduct.

(o) The Eighteenth Claimant: Mr Tanfield

178. Since Mr Tanfield did not have a home of his own, he had to provide a guarantor. A guarantee was provided by his father. His father died on 18 March 2020. He described how difficult it was for him in the period before his father's death. When the death occurred, he needed to take the next week off in order to grieve and to help his mother. On 20 March 2020, he informed Mr Benson by email of the situation. He asked to be able to take a second week of holiday (meaning a franchise fee free week) for this: he had just taken a week of holiday for an operation which he had just had. Mr Benson replied within just over an hour, saying that he could not see that that would be a problem. He then wrote: *"I'm sorry to hear about your dad however, your dad was/is your guarantor is he not?"* Mr Tanfield did not respond, saying that following that response, he could no longer bear to have anything to do with him. He said that he found this to be heartbreaking that someone would put their business before the wellbeing of a franchisee or any human being. He said, *"to me it was just beyond words*

really, appalling." This was heartfelt and genuine evidence, and I have no hesitation in accepting how devastated he was about the way in which he felt that he had been treated.

179. This was then followed by a letter from the solicitors for JBL on 27 March 2020 at a time when there had not been any breach of contract expressing condolences and saying that until a replacement guarantee was provided, there could not be a distribution of the estate. At that time, the funeral had not yet taken place. Evidently stricken by grief as well as angry and disgusted by the correspondence, Mr Tanfield did not respond to these letters and to follow up correspondence to his mother on 8 and 16 May 2020 and on 8 June 2020. In oral evidence, the degree of upset caused to Mr Tanfield by the correspondence was palpable.

180. It is not an answer to say simply that there is room for disagreement about the sensitivity of the letters. Ultimately this is about Mr Benson and JBL. The sympathy was contradicted by Mr Benson's communication when Mr Tanfield was bereft and vulnerable, and it was entirely foreseeable that these communications at that time would have caused such distress. It is said that Mr Benson had fiduciary and statutory duties to the Company. These did not require conduct of the kind which caused Mr Tanfield so much distress. It may be noted that the duties under section 172 of the Companies Act 2006 include a duty to have regard among other things to the interests of the company's employees, the need to foster the company's business relationships with suppliers, customers and others and maintaining a reputation for high standards of business conduct. The duties to a company did not override the need for decency and space at least for a short period of time following the death and in circumstances where there was no reason to believe that there would be an immediate distribution of the estate.

(p) The Nineteenth Claimant: Ms Thornton

181. Ms Thornton made the following further allegations, namely:

(i) abusive and aggressive behaviour during one-to-one tuition;

(ii) receiving threatening letters whilst injured and unable to complete her treatment;

(iii) a post of 14 December 2020 that departing franchisees and their guarantors would have *"a deservingly and horrible and life changing 2021/2022"*.

182. As regards the first of the above allegations, Ms Thornton also gave evidence of her failing her Part 2 exam and of Mr Benson's intimidating behaviour thereafter, returning to Harlow together without his saying a word and slamming the door which left her upset. It is possible that this might have been to do with the failure of the exam and so I make no finding arising out of this incident. However, the related evidence about Mr Benson driving her and Ms Rusted to tears in one-to-one tuition is proved.

183. As regards the second of the allegations, the ankle injury started in August and may have gone on until the end of September or into October. The solicitor's letters were on 27 November 2017 and in December 2017. This part of the case is not made out. It may be that she has been affected by the tenor of the correspondence addressed to her and her mother Mrs Clarke, the guarantor, in December 2017 in which she was threatened with termination of the contracts and incurring a charge of £60,000 for losses of franchise fees going forward under the franchise agreement and for costs of £20,000.

184. She felt that getting her into the contract had been so that she would fail and he could take her mother's home through his solicitors. That is a very serious allegation, and I do not accept that Mr Benson wished her to fail from the start. Having heard the entirety of the evidence, the picture is different. The business model did involve signing up people in circumstances where it was foreseeable that they would fail as franchisees. So long as there was a property against which to enforce whether of the franchisee or the guarantor, it was a win-win. It might be that the franchisee would succeed in which case there was a regular income stream. If the franchisee did not succeed, there would be the possibility of increasing the term for reduced fees in which case JBL would have the franchisee for longer, but then the franchise fees payable on default by way of damages would be greater. If the franchisee still did not succeed, then enforcement would be brought against the franchisee and the guarantor with the possibility of taking a property about which Mr Benson bragged to other franchisees as above.

185. The context of how Ms Thornton became a franchisee was as follows. She gave evidence of the hard sell which led to her signing a franchise agreement together with a guarantor. Mr Benson had said that other people were interviewing for two positions. Ms Thornton did not wish to lose the opportunity. The length of the contract was not made clear, namely that the fixed period did not start until she became an Approved Driving Instructor.

186. As for the end, she said that the contract just seemed to go on for ever. She was never given an end date. She could not believe it when she was told that the contracts were being extended still further. She could not afford the ever increasing franchise fees which went up every year by £18 per week plus VAT, whilst the rates paid by pupils remained the same. She said that she felt that she had no choice but to quit. She said that Mr Benson completely broke her.

187. As regards the third of her allegations, this is referred to in more detail elsewhere in this judgment. Contrary to JBL's submissions, the posting of 14 December 2020 went beyond vigorous enforcement, but was abusive and aggressive "*deservingly and horrible and life changing".* It was not simply a reaction to a need to show that the terminations were treated as a breach of contract, but it was consistent with the intimidatory conduct of Mr Benson referred to on so many occasions in this case, and is a matter of which Ms Thornton was able to complain as a continuing franchisee at that stage.

(q) The Twentieth Claimant: Ms Freeman

188. The three additional allegations in respect of Ms Freeman comprise the following:

(i) receiving a racist description of her area of Thurrock. This evidence will be considered in the context of breaches of contract generally in respect of racist and abusive behaviour, and it will be found to be proved;

(ii) an insulting remark about her weight also described above. This evidence will be considered below in the context of insulting behaviour particularly to women, and it will be found to be proved;

(iii) a statement by Mr Benson of why people should be scared of him in the context of boasting of actions against franchisees and guarantors, and it will be found proved.

189. Ms Freeman, and also her father Mr Freeman, her guarantor, gave evidence about how she was not allowed to take her first contract home and thereafter regretted having signed it. She and her father stated that she was assured at the time of signing the agreement that there was a fourteen day cooling off period, but when she returned to the office thereafter to exercise that right, she was told that there was no cooling off period. She referred to how she had to pay franchise payments during 8 weeks of being off after breaking an ankle and for 2.5 weeks after some signage on her car had rubbed off. She received no referral fee when she had to hand over her pupils to others. As noted above, she gave evidence about not being given information about her end date until after three requests in writing and a telephone call.

190. I found most of Ms Freeman's evidence to be plausible. I accept the general thrust of her evidence, and I accept her specific evidence in respect of the first and second allegations. As regards the alleged misrepresentation at the time of her signing the first agreement, I accept that there was pressure to sign the agreement at the office, but I make no findings on the alleged misrepresentation that there was a cooling off period, There is no reason why this was not specifically pleaded, particularly where it is a cause of action in itself and potentially of fraud.

IX The Claimants' non-party witnesses

191. Mr Richard Dean has brought proceedings for unfair dismissal in the Employment Tribunal. He is not a party to these proceedings, but he has given evidence. Those proceedings are being defended inter alia on the basis that it is said that the Tribunal does not have jurisdiction since there is no contract of employment and that Mr Dean was self-employed.

192. Mr Dean has given evidence relating to a culture of homophobia. He and his wife feel deeply on that subject not least because two of his wife's children who are gay. His evidence was that there were homophobic remarks made by Andy Court and another instructor named Clive. In 2018 the company organised a coach trip to Brighton when Mr Court was standing up and shouting *"gays should be shot as it goes against the Bible"*. Mr Dean and his wife reminded Mr Benson of what Mr Court had said on the coach, and Mr Benson replied that Mr Court was the way he was because he was an old style homophobic. When in 2023 Mr Dean's wife referred to Mr Court as a

"knobhead", she received an e-mail from Mr Benson stating that the behaviour was unprofessional and the languages abhorrent. There was a refusal to apologise unless there would be apologies both ways which were not forthcoming. Mr Dean's evidence is that following this, Mr Dean only received one referral of a pupil from the new office manager.

193. It is sensible at this point to refer to the evidence of Mr Court. Mr Court gave evidence, but his knowledge of the Claimants was very limited because he worked from a different office dealing mostly with motorcycle instructors. He denied that he said on a coach trip to Brighton that *"all gays should be shot*", but admitted that it had been said. In that regard, I prefer the evidence of Mr Richard Dean who confirmed that Mr Court had said this. Mr Benson said of him that he was an old-style homophobic. There was also evidence of Mr Court and Mr Benson discussing different kinds of homosexual men according to their perception. This is supportive evidence to the allegations about homophobia in JBL. It got close to an admission for Mr Court to admit that this had been said, albeit not by him. At least, this is corroborative evidence of a homophobic environment not restrained within JBL, and in a public way. I accept the evidence of Mr Dean that Mr Court and another had a homophobic conversation. There is also support from Ms Newell's evidence that there was a culture of what she called Mr Benson's lackeys including Mr Court joining in with racist and sexist remarks.

194. Looking at the evidence as a whole, I accept the evidence of Mr Dean in this regard, and I do not accept the evidence of Mr Court.

195. There was evidence from Jacqueline Leech, the widow of Gavin Leech, who was distressed about the way her late husband had been treated and about the way she had been treated coldly after the death of her husband. She also alleged that Mr Benson drove past her home in the period of just over a fortnight following her husband's death. It is not necessary to make findings about these matters for the purpose of this action. For the purpose of completeness, as noted above, the father of Ms Freeman, Mr David Freeman also gave evidence.

X JBL's witnesses in addition to Mr Benson

196. Wendy Smith is an office manager who has worked with Mr Benson and JBL for over 30 years. She was for a period of time of more than 10 years a personal partner of Mr Benson. She did not mention that in her witness statement. Albeit that this point was bound to emerge, the statement would have had greater balance if it had been mentioned in her witness statement. It emerged in evidence that Mr Benson is according to her the stepfather to her two children and that her children are Mr Benson's next of kin.

197. Instead, the statement contains many remarks about Mr Benson and JBL praising him as "very fair" and "more than fair". She sought to justify practices of JBL. For example, she thought that it was good not to have a personal number of a franchisee because head office always answers calls professionally.

198. Wendy Smith came over as a cautious witness and one affected by loyalty to JBL and affection for Mr Benson. She described the workplace as being one of harmony even when confronted with behaviour that Mr Benson had previously admitted when he told

Ciera Rogers and her to *"f*** off"*. I was unimpressed by her evidence that people were happy to enter into long-term agreements. At one point she said that Mr Benson was passionate about the business and would do anything for the franchisees to do well. He knew the tricks of the trade and if the franchisees listened to him they would be successful. That seemed to me in the context of the evidence as a whole to be viewing the business and Mr Benson and its practices through rose tinted spectacles.

199. Wendy Smith said that she thought that Mr Benson was sympathetic to everyone. It was then put to her that Mr Benson said of a franchisee that he was a pussy when he reported that he was not fit enough to work, and she responded that this was not said directly to the franchisee. In respect of the Chinese franchisee of whom Mr Benson used an offensive epithet, she said that Mr Benson did not mean this in a racist way. In respect of a recording of a conversation with Ciera's father whom he called a *"retard"*, she said that he must have been provoked. In respect of the postings about ruining people's lives, she said he does not ruin people's lives. That conversation was in 2023 and is therefore of limited relevance to these proceedings, but it contains pages of vile and aggressive abuse from Mr Benson to Ciera's father, Simon, which is evidence of the personality of Mr Benson.

200. There were put to her extracts from a taped conversation between Susanna Summers and Linda Sharpe (who worked at the office). Ms Sharpe said *"... if people pissed him off we were told to not book any pupils with them. That was in response to Ms Summers saying, "I was under the impression if you was in his bad books your diary went to the back of the pile and stayed and only got bookings if there was no one else to take it"*. Later in the conversation, Ms Sharpe said *"he has big problem with mental health. He told [a named employee] if he knew at the interview that she had mental health issues he wouldn't have employed her."* Whilst none of this affected the view of Wendy Smith of Mr Benson, cumulatively it undermined her glowing views about him and did not stand scrutiny in view of the oral and documentary evidence in the case as a whole.

201. The evidence of Lisa Charalambous and Roderick Stubbs were of limited assistance because they did not become trainees/franchisees until almost years after the termination of the Claimants' agreements. They said that they kept matters to themselves. As present franchisees, they both had reasons not to give evidence to the detriment of JBL and Mr Benson, which does not mean that they were intending to mislead. Mr Stubbs had no coherent explanation why he had signed a number of agreements with longer periods. One agreement was *"in settlement of a dispute"* which he said was not exactly a dispute. Likewise, Mr Kevin Carroll's evidence was of little value to the issues in the case. He is now retired. His statement did not disclose that he had been on a 0 fees agreement since 2012. He confirmed that he had little interaction with his fellow instructors and he just kept his head down to do his job.

202. Two witnesses recruited in 2017 were Grant Bywaters and Robert Garrard. Mr Bywaters had little interaction with the Claimants and who paid little attention to the Just Benson Facebook group. Mr Garrard's guarantor was his mother. He said that the life of a driving instructor was quite an isolated one and he knew very little of the experiences of his colleagues. He said that he paid no attention to the reputation of Mr Benson. This was confirmed by the fact that it appeared that he learned for the first time at trial that Mr Benson had been convicted of a firearms offence. Their evidence too was of very limited assistance.

203. There were two further witnesses who had signed ten-year agreements namely Sajjad Hussain and Jonathan Challis. Mr Hussain was in poor health with progressively worsening symptoms and had signed a 10year agreement at the start of COVID and a further agreement in May 2022. Mr Challis had signed various agreements until he reached a 10year commitment. His agreement was guaranteed by his mother. He says that he was not aware of various racist aggressive or intimidating conduct by Mr Benson. I do not find that these witnesses in any way cause me to doubt the validity of the evidence of the Claimant's witnesses. The probability is that they have been anxious not to say anything which would upset thei position with Mr Benson and to protect themselves, and in the case of Mr Challis, his mother. That is not to say that their evidence was dishonest, but it explains why it is that they and indeed other witnesses on behalf of JBL have been supportive and/or uncritical of JBL. I have referred to the evidence of Mr Court elsewhere in the context of the evidence of Mr Dean.

XI The first preliminary issue: Implied terms

204. In respect of the first of the preliminary issue, the question arises whether on the facts of the instant case the alleged implied terms of good faith and fair dealing are to be implied.

205. The first of the preliminary issues which now arises for consideration is as follows: were the contracts entered into between the Claimants and the Defendant's contracts under which the parties owed a duty to conduct themselves in good faith and to deal fairly with one another?

206. The starting point is the pleaded case in the Particulars of Claim. It was stated as follows:

> "3. The claimants each committed to long term commercial relationships that require them to cooperate and collaborate with JBL.
>
> 4. The commercial relationship bore many of the hallmarks of an employment relationship
>
> ….
>
> 5. In the premises each of the contracts listed... involved long term commercial relationships requiring a high degree of communication, cooperation and predictable performance with expectations of loyalty. They were relational contracts under which the parties owed a duty to conduct themselves in good faith and to deal fairly with one another.
>
> 6. As incidents of that duty JBL was obliged:
>
> a. Not to do anything to substantially deprive the claimants from obtaining the benefits it had granted to them;

> b. Not in [any] other way to undermine the terms of the bargain that it is entered into with the claimants;
>
> c. Not to exercise any discretion arbitrarily or capriciously;
>
> d. To refrain from conduct which in the relevant context would be regarded as commercially unacceptable by reasonable and honest people, and/or
>
> e. Not to conduct itself, without reasonable or proper calls, in a manner likely to cause serious damage to the relationship of mutual trust and confidence.
>
> 7. Further or alternatively, each of the above duties comprised intrinsic terms of the claimants respective contracts, the implication of which is necessary to give business efficiency to the franchise agreement or because those duties are "so obvious is to go without saying".

207. The Court has been taken to Australian cases and legislation which have held that an obligation of good faith and fair dealing is implied into every franchise agreement. On that basis, the allegation is that terms are to be implied as a matter of law into such contracts. In the alternative, it is has been submitted that the terms are implied as a matter of fact, based on the context of the specific franchise agreements between the respective parties to this action.

(a) The case law regarding the nature of franchise agreements

208. There has been a traditional assumption in cases in English law that a franchise agreement is akin to a vendor/purchaser agreement rather than an employment agreement. This has been seen in the context of the analysis of post-termination restraints: : see *Prontaprint v London Litho Limited* [1987] FSR 315 (Whitford J); *Kall-Kwik (UK) Ltd v Rush* [1996] FSR 114 (HH Judge Cooke sitting as a Deputy Judge of the High Court) and *Dyno Rod v Reeve* [1998] FSR 148 at 153 (Mr Justice Neuberger, as he then was). Such restraints are prima facie in restraint of trade in both contexts such that the party seeking to enforce the restraint must show that it is no wider than reasonably necessary to protect their legitimate interest. Nevertheless, the court is more tender to protect an employee against an ex-employer than a vendor against a purchaser. In the instant case, the post-termination covenants have not arisen for consideration as to their reasonableness. Nevertheless, the discussion in these cases as to whether a franchise agreement is closer to a business sale agreement or an employment contract is instructive in considering the argument that the instant contract had hallmarks of the latter.

209. Reference is made to the case of *Bedfordshire CC v Fitzpatrick Contractors Ltd* (1998) WL 1043273 in which Mr Justice Dyson (as he then was) was asked by the Claimant to import the implied term of trust and confidence into a commercial setting of a

highway maintenance contract between a contractor and a local authority. Whilst not a franchising case, it is useful because it contains dicta about how inapposite it was considered to be to import implied terms from employment law into a commercial agreement. In refusing to imply a term, Dyson J made the following points:

(1) The requirement of necessity was not satisfied in that the contract contained a number of express terms which gave the local authority very considerable rights and powers of control over the contractor to perform. The court should be very slow to imply a contractual in general terms where the contract contains numerous detailed express terms such as the contract in that case. The court should only do so whether as a clear lacuna.

(2) Whilst an implied term of trust and confidence would be read into a contract of employment, the instant contract was very different from a contract of employment.

(3) That was a matter peculiar to employment law which underlay the implied term of trust and confidence, namely the ability of an employee who had been unfairly treated by his employer to exercise his or her statutory right to claim for unfair dismissal. There was no relevant analogy between a complex commercial contract and a contract of employment.

210. Reference was also made to *Morrow v Safeway Stores Plc* EAT 21 September 2021. It contains quotations from *Western Excavating v Sharp* 1978 IRLR 27 to the effect that the conduct had to be sufficiently repudiatory to justify a conclusion of constructive dismissal whether that was based upon fundamental breach of contract or a breach of a fundamental term of the contract. Any conduct which was likely to destroy or seriously damage that relationship must be something which goes to the root of the contract in that it is fundamental in its effect on the contract.

211. In *Jani-King (GB) Ltd v Pula Enterprises Ltd* [2007] EWHC 2433 (QBD), a franchising case, the Court (HH Judge Coulson QC as he then was) followed the reasoning of *Bedfordshire CC v Fitzpatrick Contracts Ltd* in refusing to imply the term of trust and confidence into a commercial agreement. On a preliminary issue, the Judge decided that the relationship in *Jani-King* was much closer to an ordinary commercial relationship than to a contract of employment. The contract was entered into with a company and contained very detailed express terms. The Judge noted the express provision that the relationship was one of independent contractor and not of agency or employment, and the authorities as they existed at the time were quoted e.g. *Kall Kwik Printing (UK) Ltd v Rush* and *Dyno-Rod v Reeve*.

(b) The more recent cases on franchise agreements

212. Despite this line of authorities, the Court of Appeal has in more recent times expressed the matter differently. Whilst every case will depend on its own facts, there are cases where a franchise agreement may be closer to an employment contract than to a sale of a business. In *Dwyer (UK Franchising) Ltd v Fredbar Ltd and another* [2022] EWCA

Civ 889, the Court of Appeal affirmed the approach in an earlier case of the Court of Appeal in *Quantum Actuarial LLP v Quantum Advisory Ltd* [2021] EWCA Civ 227. In *Quantum*, Carr LJ (as she then was) gave the judgment with which the other two Lord Justices agreed. At para.60, Carr LJ set out the relevant legal principles concerning restraint of trade and factors to be considered when assessing reasonableness between the parties. In *Quantum*, the Court held that in relation to the interests of the contracting parties courts should be slow to substitute their own objective view over the contracting party's subjective view, provided the parties were negotiating on equal terms, but in the judgment of Carr LJ, *"that consideration will carry less or no weight if the parties were negotiating on other than equal terms. The absence of independent legal advice for the weaker party may also be relevant."*

213. At [65], Carr LJ stated among other things:

> "vi)What is reasonable may alter with the changing nature of commerce and society (see in particular Nordenfelt (at 547 per Lord Herschell);
>
> vii)Factors to be considered when assessing reasonableness between the parties include the character of the business (see in particular Nordenfelt (at 550 per Lord Herschell)) and also:
>
> a)The relevance of the consideration for the restraint;
>
> b)Inequality of bargaining power;
>
> c)Standard forms of contract;
>
> d)Whether the restraints operate during or post-contract;
>
> e)The surrounding circumstances, including the factual and contractual background; (see in particular Panayiotou (at 329-336 per Jonathan Parker J));
>
> viii)The duration of an agreement in restraint of trade is a factor of great importance in determining whether the restrictions in an agreement can be justified (see in particular Schroeder (at 1312F-G per Lord Reid));
>
> ix)The level of compensation may be relevant to the question of reasonableness (see Esso (at 300B-C per Lord Reid) and Panayiotou (at 329-330 per Jonathan Parker J))".

214. In the *Dwyer* case Sir Julian Flaux gave the leading judgment. The Court emphasised that a factual assessment was required in order to ascertain the reasonableness of the restrictive covenant. He referred to unusual features which led to Mr Bartlett setting up his franchisee company, *Fredbar Ltd*, to enter into the franchise agreement. Mr Bartlett had no previous experience of the Drain Doctor business, had limited assets

and the franchisor had doubts about Mr Bartlett's ability to succeed. Further, in seeking to persuade Mr Bartlett to enter into the franchise agreement, the franchisor had produced more attractive forecast figures than those originally provided. Further, it was likely that if the franchise business failed, Mr Bartlett and his family would lose their house.

215. The Court of Appeal accepted that the personal circumstances of the franchisee could affect the reasonableness of a restraint and were relevant to the question of what protection the franchisor required. Likewise, inequality of bargaining power was relevant – the franchise agreement was a standard form contract where there was no ability to negotiate, following the approach in *Quantum*. At para. 80, Sir Julian Flaux stated:

> "80.Dwyer knew that Fredbar and Mr Bartlett were starting up this business for which he was the only employee and it also knew that he had no previous plumbing experience. He attended an induction day after which Dwyer through Mr Jeannes clearly formed the view he was not suitable as a franchisee and, as the judge found, failure of his franchise was foreseeable. As the judge also found at [305(d)] there was no evidence of any discussion or negotiation of the restraint of trade provisions to take account of those matters and there was total inequality of arms. The standard form agreement had to be accepted or rejected. Given the inequality of bargaining power which undoubtedly existed, I agree with Mr Grant QC [Counsel for the franchisee] that, on the facts of this case, the franchise agreement is more akin to an employment contract that to the sale of a business."

216. In a judgment agreeing that the appeal should be dismissed, Arnold LJ stated at [90] as follows:

> "It is inescapable, however, that not all potential franchisees are equal. Some potential franchisees have more bargaining power, are less likely to fail as franchisees and more likely to be able to survive the consequences of failure than others. Mr Bartlett had little bargaining power, was more likely to fail than to succeed, particularly in the short term, and was at risk of financial disaster if he failed. Accordingly, in this case, the relationship with Dwyer was close to an employment contract than to a sale of a business".

(c) Do the instant franchise agreements have hallmarks of an employment relationship?

217. It is not pleaded that the contracts are contracts of employment, rather that the contracts have many of the hallmarks of an employment relationship. This is an important point

in the analysis for the following reasons. First, whilst the letters leading to termination in late 2020 analysed the matter on the basis of an employment contract or in the alternative on the basis of a long-term relationship based on cooperation or collaboration and having hallmarks of an employment relationship, the instant claim is not as employee but on the basis of a close personal relationship. As noted, Mr Dean was called as a witness who has made a claim in the Employment Tribunal on the basis that he was an employee of JBL, but the Claimants have not made such a claim and so the issue in Mr Dean's case does not arise for consideration in this case.

218. In its closing written submissions under the heading *"is the Agreement akin to an Employment Relationship?"*, JBL has addressed the question as to whether the agreements were employment contracts. Showing that the relationships were not employment relationships does not show that the agreements were not more "akin" to employment agreements than to commercial agreements. In this regard, JBL sought to distinguish the instant case from *Autoclenz v Belcher* [2011] UKSC 41 in which especially at paras. 36-38, the Supreme Court had found that despite various labels, the agreements were contracts of employment.

219. That is to set up a distinction which goes beyond the Claimants' case. The Claimants do not say that they were employees, but looking to the substance of the case, they say that their case is far closer to an employment contract than to a commercial agreement, pointing to the terms of the contract, the level of control and the inequality of the relationship.

220. JBL sought to distinguish the instant case from *Uber BV v Aslam* [2021] UKSC 5, especially at paras. 94-100, where the level of control of *Uber* was so complete over the driver that the latter was considered a "worker" under employment legislation. Here too, this is to set up a false question. If the level of control in this case is less than in the *Uber* case or if the franchisees in this case might not be considered "workers" within the statutory meaning, that is not the issue.

221. JBL's starting point is to refer to the terms of the agreements, which include provisions designed to show that they are not employment contracts, namely:

(1) the franchisees have been accounting between them and JBL and with HMRC as a self-employed business;

(2) the agreements are drafted on this basis;

(3) there are no fixed hours or dates during which the franchisee is to work, and the franchisees could take holidays when they liked.

222. The Claimants draw attention to the following points, namely:

(1) the agreement is made between the franchisee personally and JBL, even if they are trading through a limited company;

(2) there is no power to delegate or sub-contract performance or to assign the agreement to anybody else. There was no income from pupils re-allocated to other instructors;

(3) a franchisee was obliged to "devote substantially the whole of your time and attention to your franchise and shall not carry on any other business other than the franchise or become involved either directly or indirectly in any other business activities in any capacity without the prior written consent of the franchisor", such consent being capable of being withdrawn on 28 days' notice: see Clause 5(j) of the contract attached at Annex 2 to the Particulars of Claim ("POC");

(4) whilst the franchisee was free to choose its own holidays, there were only two franchise free weeks a year to be taken subject to various conditions set out in Clause 8. Given that franchise fees were by fixed per week rather than by reference to turnover, the effect for practical purposes was that the scope for taking holidays was limited. A holiday in a non-franchise free week for franchisees who had difficulties in breaking even was precarious;

(5) the franchisees were obliged *"not during the subsistence of the agreement to give driving lessons other than in the name of the Franchisor and subject to the terms of this agreement";*

(6) there was a duty to act in the best interests of the franchisor (clause 5(a)) and to use best endeavours at all times to assist the Franchisor in developing and improving the Franchisor's business (Clause 5(b));

(7) the franchisees agreed *"to give tuition in accordance with guidelines laid down by the Franchisor"* (Clause 5(f)). The Franchise Handbook comprises *"19 very important pages that must be read and comply with before/during your franchise running (sic)".* The cover page provided that *"promotion must be for and on behalf of Benson School of Motoring as a whole and not yourself as an individual."*

(8) at least until 31 January 2020, to *"charge for driving tuition only such fees as are prescribed by the Franchisor"* (clause 5(g)): this is discussed further below. At least until then, JBL did not permit the franchisee to fix their own fees.

223. JBL submits that an implied term of trust and confidence cannot be implied into a franchise agreement for various reasons. They include that franchise agreements are generically closer to leases of goodwill or standard commercial agreements. JBL submits that it is unprecedented to have the implied term as to trust and confidence being extended to a franchise agreement. JBL emphasises the *Jani-King* case referred to above. It also submits that whilst the subsequent cases led to restraint of trade clauses being treated in a more tender manner than a commercial relationship, that did not open the door to implied terms of trust and confidence outside the employment relationship.

224. The Claimants' answer to this is to refer to *Quantum* and *Dwyer* above. The features which made the Dwyer case closer to an employment agreement included the following points, namely (i) the inequality of bargaining power, (ii) the absence of relevant previous experience of the franchisee, (iii) the standard terms and conditions, and (iv) the foreseeability of failure.

225. There are many features in this case which establish inequality of bargaining power between franchisor and franchisee including the following:

(1) the franchisee being a sole individual as opposed to being part of a larger enterprise;

(2) the franchisee having not been in business on their account before and/or having no or little experience of running a business;

(3) the franchisee having had few educational advantages beyond some basic qualifications, typically at GCSEs/O levels;

(4) the franchisee having had a difficult work history whether because of commitments at home or redundancy or other challenges;

(5) the franchisee having very limited resources (the reason why there are numerous additional parties in this case is that they are guarantors, guarantees being taken when a new franchisee does not have a home of their own).

226. There are other features in respect of inequality of bargaining of power applying to each of the franchise agreements, namely the absence of independent legal advice to the franchisees before entering into the agreements. It was written on each agreement the following, namely: "*If you are in any doubt as to the meaning of this agreement you should consult a solicitor. a copy of this agreement can be sent to your solicitor upon request and before signing. do not feel that you must sign today."* JBL places heavy reliance upon the fact that this appeared in block capitals and in red in each of the franchise agreements. The suggestion is that in deciding not to take independent legal advice, the franchisee proceeded in this way despite the encouragement of the franchisor.

227. I do not treat the matter in this way. Whilst the words used are not insignificant, experience showed that a typical franchisee would still proceed without legal advice. There were less than a dozen instances when independent legal advice had been sought. Most people without business experience would not have a solicitor of their own, and if they did, it would be likely to be somebody without a background in franchising. They may not appreciate without business experience how important such advice was before entering into a long-term agreement.

228. The inequality of bargaining power could have been reduced in the event that there had been an insistence on the franchisee taking independent legal advice, perhaps coupled with a list of possible solicitors with experience in franchising. In any event, the fact is that these long-term agreements were entered into by persons of the kind referred to above. They were not allowed to take the draft agreements home at least to consider at

leisure or with family and friends. By contrast, JBL was advised by solicitors Holmes & Hills who represented him in his many disputes with franchisees and in creating or updating agreements and Mr Benson himself had decades of experience in the industry.

229. This position became starker when considering a pattern of evidence provided by a number of witnesses about the modus operandi of JBL in respect of signing the agreements. That comprised that the prospective franchisee was not allowed to take home a copy of the agreement to consider for fear of engaging provisions about the agreement being cancellable for not having been entered into at the premises of JBL. The prospective franchisee was allowed time at the premises to consider the terms of it. That is not the same as having the opportunity to take it home and to consider it with family and friends in their own time. It was accompanied with some amount of pressure in that in particular Mr Beck said to some franchisees, which I accept, that this was a good opportunity that would not be kept open for them if they did not sign that day. Even if that had not been said, it would not change the overall analysis.

230. The effect is that potentially onerous terms were not considered carefully and were unbalanced and particularly disadvantageous to the franchisees. By way of examples only, the following appear potentially onerous, namely:

(1) the agreements were entered into before the franchisee had qualified to offer tuition and contained a long minimum period post-qualification at time when it is not known whether the person will pass the exams and /or whether the person is equipped to become a driving instructor;

(2) the very complex provision about the duration of the agreement in which the fixed term follows from the time spent receiving instruction: even 36 months after instruction appears to be a long period of time without the ability to terminate on a shorter period of notice. Even if some time is required to amortise an investment, the duration of even 36 months seems a long time. Instead of a shorter period, there could also have been a shorter period with a period of renewal in favour of the franchisee;

(3) the clause about the duration of the term was very difficult to decipher without a high level of familiarity with legal or commercial documents. The effect was such that Claire Freeman required assistance as regards her end date, and her calculation and that of JBL were 11 months apart;

(4) those points then become magnified in respect of new agreements for as long as 132 months without the opportunity for the franchisee to terminate other than for repudiatory breach. This is in contrast to the position of the franchisor where any breach can become a fundamental term if not corrected on notice, entitling the franchisor to terminate for breach and then to recover damages for loss of bargain for the duration of the length of the minimum term of the agreement: see Clause 9 and para. 48 above).

231. As is apparent from the nature of the counterclaims in the instant case, the method of operation was to invoke the clauses in the agreements enabling JBL to terminate for breach and claim the entirety of the fixed fees which would have accrued over the years

which followed. This has given rise in the instant claim to counterclaims based on unlawful termination for sums over £100,000 in respect of the Second, the Fourth, the Fifth, the Tenth, the Eleventh, the Fifteenth and the Sixteenth Claimants. In the case of the Eleventh Claimant the sum is more or less than £300,000 depending on whether the claim is for liquidated damages or damages, and the consequence of a minimum term of 11 or 13 years. The other claims are usually for several tens of thousands of pounds. It is not likely at the time of the agreement, which is the operative time for the purpose of considering an implied term, that this would have been appreciated by new franchisees looking over the agreement in the offices of the franchisor without independent legal advice and without the opportunity even for mature reflection at home or with a friend.

232. JBL has submitted at para. 37 of the final submissions that the contract is *"in fact a very fair contract"* because of not paying franchise fees during the training period. It says that a favourable comparison is with the Bill Plant franchise agreement where fees appears to kick in from the start. In that agreement, the franchise fees are much less (the one in the bundle is in September 2024 and the weekly fees are far less than the sums in the JBL agreement). There is no annual increase, although it may be that fees are payable during the period before becoming an Approved Driving Instructor. It would be necessary to have more information to understand how that worked.

233. In fact, in a crucial respect, the JBL agreements do not bear a favourable comparison with the Bill Plant agreements, relied upon from evidence adduced by JBL. Despite a ten year term, the Bill Plant franchise may be terminated on 6 months' notice after the first year (or possibly on 12 months' notice from the completion of a CPD course: see para. 11(B). If JBL had such provisions, the Counterclaim in this case would have been for a fraction of the sums now claimed, and it is to be inferred, the amounts at stake in the many cases brought by or settled by JBL would have involved far lower sums.

234. Insofar as a number of franchisees gave evidence that Mr Beck put pressure on prospective franchisees to sign, saying that there were special terms which would only be available that day, that was not specifically pleaded as giving rise to a cause of action. It was therefore submitted on behalf of JBL that there was no need to adduce evidence from Mr Beck in this regard. Leaving aside the evidence that Mr Beck was said to be unwell and in sheltered accommodation, I shall exercise my discretion against drawing an inference from the fact that he had not been called, in part because of his being said to be unwell and in part because whilst he is mentioned in pleadings, he does not loom as large there as in the subsequent witness statements. That is not to say that the Court should disregard the references to him in the Claimant's witness statements.

235. JBL has expressed concern that an unpleaded allegation of duress or misrepresentation would infect the way in which the Court examined the case as a whole. This judgment does not base anything on duress or misrepresentation.

236. It is right to take into account an inequality of bargaining power (not to invalidate the agreements or to give rise to a right to damages) in evaluating whether or not it contained an implied term of good faith. It has been a part of the background to the making of the agreements, in the pleaded case about the agreements having many of the hallmarks of an employment relationship and being long-term relationships requiring a high degree of communication, cooperation and predictable performance with expectations of loyalty. It has been foreshadowed in the witness statements of the

Claimants. Further, albeit to a more limited extent, Mr Beck was mentioned in the pleadings. No inference will be drawn about the absence of Mr Beck at trial.

237. I heard the evidence as a whole and prefer the evidence that there was some amount of hard sell to get the agreements signed on the day that they were presented, despite the evidence of Charalambous, Stubbs and Garrard as well as Andy Court and Mr Benson. I do not regard the presence of the words in red at the top as giving the lie to hard sell, contrary to that which is submitted on behalf of JBL.

238. The proof of the pudding was in the eating in that very few franchisees consulted with a solicitor, which was an unsatisfactory state of affairs for such an agreement and containing the onerous terms which it did. The subsequent experience of so many franchisees was that they would have been better finding out how onerous the agreement was at the start rather than facing the consequences when they were unable to continue or wished to exit early. It would have been different if the franchisees had been advised in strong terms to get independent advice with information as to how to find a legal adviser.

239. The effect might have been that the franchisees would have been less likely to sign there and then, though that would not have suited the business interests of the franchise, which was to sign up as many franchisees as possible (incentivising those franchises who introduced new franchisees). On the other hand, if the franchisees had received such firm advice together with a list of possible solicitors, then the point about inequality of bargaining power would be reduced in force. In that event, either the franchisee would have been represented or they would have elected to enter into the agreement without a lawyer despite firm advice that they should receive such advice. In the way in which it occurred, there was no election in the instant cases. It was also a part of the business model to obtain guarantors where a franchisee did not own a property, and remarkably in this context, there was no advice on the document or at all for the guarantor to obtain independent legal advice. Mr Benson equated his position to the Halifax who would obtain a charge in order to secure lending: he did not see any distinction between securing moneys lent and in the instant case securing the damages of years of loss of profits consequent upon an early termination.

240. In *Dwyer,* there was an additional feature, namely that the franchisee was bound to fail, and this was foreseeable. The Court does not have to go so far as to find that the franchisees were bound to fail. However, the large number of franchisees who did fail and the criticisms in this judgment about the business method make it the case that there was a serious risk that these Claimants would fail and that it was foreseeable at the outset that this would occur. The agreements and the insistence on guarantors where the franchisee did not own a property had that in mind.

241. I conclude that whilst in case law, generally franchise agreements have been treated generically as closer to leases of goodwill or standard commercial agreements, the instant case has much more in common with the above quotations in *Quantum* and in *Dwyer*. This case does not change the more usual characteristics of a franchise agreement. It is simply that each case must be looked at on its facts. In short, it is closer to an employment relationship than a commercial contract such as a sale of a business or a commercial licence. Whilst JBL relies on the reasoning in the case of *Jani-King* referred to above, that agreement was not akin to an employment contract but was characterised as a very detailed commercial agreement. Further, that case

preceded the learning about implied terms of good faith over the last 18 years since *Jani-King* to which reference will be made in the next section.

242. Insofar as it is said that *Quantum* and *Dwyer* were about restraint of trade clauses and not about implied terms of good faith, that is to misunderstand the reasons for the protections of the courts. In a restraint of trade clause, by finding the underlying agreement closer to an employment agreement than an agreement for the sale of a business or a licensing agreement, the Court is being benevolent to protect the party with a weakness of bargaining power. In my judgment, just as such a benevolent approach exists in the context of restraint of trade, so too it features in respect of implied terms of good faith at least to the extent that a term of a trust and confidence is implied in an employment agreement.

243. It is worth drawing attention to a difference in the way in which employment contracts are treated from commercial contracts, particularly where there is an inequality of bargaining power. This contrast by way of example appears in the following dicta from cases, namely:

(1) in *Braganza v BP Shipping Ltd* [2015] UKSC 17, a case about an implied term that discretions in contracts will not be exercised arbitrarily or capriciously, in the speech of Lady Hale at para. 18, she said: *"Contractual terms in which one party to the contract is given the power to exercise a discretion, or to form an opinion as to relevant facts, are extremely common….the party who is charged with making decisions which affect the rights of both parties to the contract has a clear conflict of interest. That conflict is heightened where there is a significant imbalance of power between the contracting parties as there often will be in an employment contract. The courts have therefore sought to ensure that such contractual powers are not abused. They have done so by implying a term as to the manner in which such powers may be exercised, a term which may vary according to the terms of the contract and the context in which the decision-making power is given."*

(2) Lord Hodge at para. 55 in the same case put the matter more starkly: *"The personal relationship which employment involves may justify a more intense scrutiny of the employer's decision-making process than would be appropriate in some commercial contracts."*

(3) In *Johnson v Unisys Ltd* [2003] 1 AC 518 (at para 20) Lord Steyn stated: *"It is no longer right to equate a contract of employment with commercial contracts. One possible way of describing a contract of employment in modern terms is as a relational contract.""*

(4) Similarly, in *Keen v Commerzbank AG* [2007] ICR 623, Mummery LJ stated (at para 43):*"Employment is a personal relationship. Its dynamics differ significantly from those of business deals and of state treatment of its citizens. In general, there is an implied mutual duty of trust and confidence between employer and employee. Thus it is the duty on the part of an employer to preserve the trust and confidence which an employee should have in him. This affects, or should affect, the way in which an employer normally treats his employee."*

244. It therefore should be the case if a contract is closer to an employment agreement than to a commercial agreement, then by analogy, there is scope for implication of a term of good faith, just as the Court is prepared to adopt a benevolent approach to clauses in restraint of trade.

245. The analysis of JBL was to say that whatever features there may be of some amount of control and inequality of bargaining power, in the end, this was a commercial agreement. It is accepted that the franchisees were self-employed. It was not right to say that it was akin to an employment relationship. Many of the franchisees who gave evidence had put to them eight features which were said to be benefits conferred by JBL. They were as follows:

(a) the right to trade under a reputable and well-established brand, and to benefit from the associated goodwill;

(b) access to training;

(c) a right to guidance as to how to set up and operate a business;

(d) a right to have the brand advertised;

(e) a right to receive individualised publicity material free of charge;

(f) signwriting and clothing paid for up front (subject to repayment at termination);

(g) the office to take bookings and, where possible, refer work; and

(h) a network providing professional and social support.

246. I do not accept that these factors taken together or singly tilt the balance away from the relationship being more akin to a contract of employment than to a commercial contract. Some franchisees did not readily accept in cross-examination that the brand was regarded as reputable. Even assuming it to be the case, the extent of the benefit of goodwill is not a given. The franchisees got nothing out of the goodwill in the sense of having something of value such that they could sell or assign the franchise to a buyer or an assignee. The agreements contained no provision entitling the franchisee to sell or assign the franchise and on termination, there were restrictive covenants so as to protect the goodwill which at all times belonged solely to JBL, even if a franchisee had built up a good following (Clause 10). The outgoing franchisee had to return his phone number and procure the transfer of pupils to JBL There were a number of detailed provisions in Clause 10 to this end including a restrictive covenant.

247. Put this way, the franchisees' position was not very different from the position if they had been employees, operating with the benefit of the goodwill generated by the employer, having training or guidance from the employer, having the brand being advertised and receiving work to do from the employer and with the assistance of colleagues. Many of these matters would be incidents of an employment relationship, and to that extent were neutral or not particularly probative.

248. It all has to be seen as part of a wider picture which none of those indicia recognise. This includes the following features, namely:

(a) being forbidden to advertise the price of lessons;

(b) being compelled to charge the price set by JBL at least until January 2020, and possibly thereafter based on the subsequent communications;

(c) the referral of new pupils being in the hand of JBL with the obligation being confined to what was "reasonably possible" and "not guaranteed": see clauses 4(d) and 4(e);

(d) the degree of dependency of the franchisees on the franchisor in the implementation of the agreement and the referring of work;

(e) the obligation of the franchisees to participate in advertising by leafleting often outside their home patch and without any fee for the same, and such advertising to be for the brand rather than for themselves: see clause 5(d) and 5(e), 10,000 leaflets per year being a minimum requirement;

(f) being generally unable to advertise their own number on their cars and thereby generate business for themselves rather than the brand, but the vehicles to be sign written to JBL's specification: see clause 5(s);

(g) the degree of control of JBL over the franchisees and the requirement to observe the instructions of the franchisor on a regular basis and about every aspect of their work;

(h) being subject to numerous "guidelines", in effect rules, of JBL, with the sanction of being removed from the Just Benson Facebook Group;

(i) the length of the agreements;

(j) the inability to terminate the same on the part of the franchisees save upon effluxion of time and save for repudiatory breach in contrast to the position of JBL;

(k) the large amount of weekly fees which escalated each year at a far greater rate than the amount charged for the lessons;

(d) Case law relevant to alleged implied terms

249. The next section of this judgment will engage with the circumstances in which under English law, there is a duty or an implied term requiring parties to conduct themselves in good faith and to deal fairly with one another. This is not limited to contracts of employment, but extends to what have been called relational contracts, particularly in long-term contracts which involved cooperation and collaboration. This engages with an area of developing jurisprudence, which owes much to the decision of Leggatt J in *Yam Seng Pte Ltd v International Trade Corp Ltd* [2013] EWHC 111 (QB). The

starting point is that unless there is an established relationship giving rise to such an implied term such as an employment contract or a fiduciary relationship giving rise to such duties such as between partners, a director and company or between a trustee and beneficiary or some agents and principals, there is no scope for implying such a term or imposing such a duty.

250. In *Yam Seng*, there was a duty of good faith implied into an exclusive long-term distributorship agreement a duty of good faith. Leggatt J (as he then was) remarked on the greater traction to implying terms of good faith in other common law jurisdictions and especially in Australia. In those courts, the relationship of the parties may give rise to the implication of such a term in law. Although there was much greater reluctance in the English court, Leggatt J said the following at para. 131:

> **"**Under English law, a duty of good faith is implied by law as an incident of certain categories of contract, for example, contracts of employment and contracts between partners or others whose relationship is characterized as a fiduciary one. I doubt that English law has reached the stage, however, where it is ready to recognize a requirement of good faith as a duty implied by law, even as a default rule, into all commercial contracts. Nevertheless, there seems to me to be no difficulty, following the established methodology of English law for the implication of terms in fact, in implying such a duty in any ordinary commercial contract based on the presumed intention of the parties."

251. Leggatt J (as he then was) at [142] said:

> ""English law has traditionally drawn a sharp distinction between certain relationships – such as partnership, trusteeship and other fiduciary relationships – on the one hand, in which the parties owe onerous obligations of disclosure to each other, and other contractual relationships in which no duty of disclosure is supposed to operate. Arguably at least, that dichotomy is too simplistic. While it seems unlikely that any duty to disclose information in performance of the contract would be implied where the contract involves a simple exchange, many contracts do not fit this model and involve a longer-term relationship between the parties in which they make a substantial commitment. **Such "relational" contracts, as they are sometimes called, may require a high degree of communication, cooperation and predictable performance based on mutual trust and confidence and involve expectations of loyalty which are not legislated for in the express terms of the contract but are implicit in the parties' understanding and necessary to give business efficacy to the arrangements**. Examples of such relational contracts might include some joint venture agreements,

> **franchise agreements** and long-term distributorship agreements." (emphasis added).

252. There was significant qualification of the above by the Court of Appeal in *Globe Motors v TRW Lucas Varity Electric Steering [2016] EWCA Civ 396*. The qualifications were to the effect that:

(1) it was only certain categories of long-term contracts in which the court may be willing to imply a duty to co-operate, where parties are making a substantial commitment to one another;

(2) even in such contracts, it may be contrary to the express terms to imply such terms;

(3) even where there are no contradictory express terms, the bar for implying terms is high based on construction or interpretation and restricted to cases of necessity rather than reasonableness.

253. Beatson LJ stated at [67] to [68] as follows:

> "67. One manifestation of the flexible approach referred to by McKendrick and Lord Steyn is that, in certain categories of long-term contract, the court may be more willing to imply a duty to co-operate or, in the language used by Leggatt J in Yam Seng PTE v International Trade Corp Ltd [2013] EWHC 111 (QB) at [131], [142] and [145], a duty of good faith. Leggatt J had in mind contracts between those whose relationship is characterised as a fiduciary one and those involving a longer-term relationship between parties who make a substantial commitment. The contracts in question involved a high degree of communication, co-operation and predictable performance based on mutual trust and confidence and expectations of loyalty "which are not legislated for in the express terms of the contract but are implicit in the parties' understanding and necessary to give business efficacy to the arrangements". He gave as examples franchise agreements and long-term distribution agreements. Even in the case of such agreements, however, the position will depend on the terms of the particular contract. Two examples of long-term contracts which did not qualify are the long-term franchising contracts considered by Henderson J in Carewatch Care Services Ltd v Focus Caring Services Ltd and Grace [2014] EWHC 2313 (Ch) and the agreement between distributors of financial products and independent financial advisers considered by Elisabeth Laing J in Acer Investment Management Ltd and another v The Mansion Group Ltd [2014] EWHC 3011 (QB) at [109].

> 68. This is not the occasion to consider the potential for implied duties of good faith in English law because the question in this case is one of interpretation or construction, and not one of implication. It suffices to make two observations. The first is to reiterate Lord Neuberger's statement in Marks and Spencer PLC v BNP Paribas Security Services Trust Co (Jersey) Ltd (see [58] above) that, whatever the broad similarities between them, the two are "different processes governed by different rules". This is, see the statement of Lord Bingham in Philips Electronique Grand Public SA v British Sky Broadcasting Ltd [1995] EMLR 472 , at 481 cited by Lord Neuberger, because "the implication of contract terms involves a different and altogether more ambitious undertaking: the interpolation of terms to deal with matters for which, ex hypothesi, the parties themselves have made no provision". The second is that, as seen from the Carewatch Care Services case, an implication of a duty of good faith will only be possible where the language of the contract, viewed against its context, permits it. It is thus not a reflection of a special rule of interpretation for this category of contract."

254. The case of *Carewatch* can be distinguished on the facts of the case and on the basis in that case that there were express terms which contradicted the alleged implied terms of good faith. Some of the terms were interpreted as being inconsistent with the particular terms sought to be implied: see para. 110 of the judgment Further, there were numerous specific implied terms contended for going beyond the more basic implied terms of good faith and fair dealing and creating a different series of obligations from those contained in the detailed contractual provisions: see para. 101 of the judgment quoting the alleged implied terms. These included terms excluding a partnership, joint venture, agency or employment relationship as well as guarantees or warranties about profitability.

255. In *Sheikh Al Nehayan v Kent [2018] EWHC 333 (Comm)* Leggatt LJ himself stated at [175], that the obligation of good faith was not limited to not being dishonest. He said:

> "…..In Paciocco v Australia and New Zealand Banking Group Limited [2015] FCAFC 50 , para 288, in the Federal Court of Australia, Allsop CJ summarised the usual content of the obligation of good faith as an obligation to act honestly and with fidelity to the bargain ; an obligation not to act dishonestly and not to act to undermine the bargain entered or the substance of the contractual benefit bargained for; and an obligation to act reasonably and with fair dealing having regard to the interests of the parties (which will, inevitably, at times conflict) and to the provisions, aims and purposes of the contract, objectively ascertained. In my view, this summary is also consistent with the English case law as it has so far developed, with the caveat that the obligation of fair dealing is not a demanding one and does no more than require a party to refrain from conduct which in the

> relevant context would be regarded as commercially unacceptable by reasonable and honest people" (emphasis added)

256. To like effect are the dicta of Dove J in *D & G Cars Ltd v Essex Police Authority* [2015] EWHC 226 (QB) who said at [175]: *"By the use of the term 'integrity', rather as Leggatt J uses the term 'good faith', the intention is to capture the requirements of fair dealing and transparency which are no doubt required….. There may well be acts which breach the requirement of undertaking the contract with integrity which it would be difficult to characterise definitively as dishonest . Such acts would compromise the mutual trust and confidence between the parties in this long-term relationship without necessarily amounting to the telling of lies, stealing or other definitive examples of dishonest behaviour."* It is clear that in that case there was considered to be more to such an obligation than acting honestly (or not acting dishonestly). (emphasis added)

257. In *Bates v Post Office* [2019] EWHC 606 QB at [725-726], Fraser J identified nine specific characteristics expected of a relational contract. He said the following:

> "725. What then, are the specific characteristics that are expected to be present in order to determine whether a contract between commercial parties ought to be considered a relational contract? I consider the following characteristics are relevant as to whether a contract is a relational one or not:
>
> 1. There must be no specific express terms in the contract that prevents a duty of good faith being implied into the contract.
>
> 2. The contract will be a long-term one, with the mutual intention of the parties being that there will be a long-term relationship.
>
> 3. The parties must intend that their respective roles be performed with integrity, and with fidelity to their bargain.
>
> 4. The parties will be committed to collaborating with one another in the performance of the contract.
>
> 5. The spirits and objectives of their venture may not be capable of being expressed exhaustively in a written contract.
>
> 6. They will each repose trust and confidence in one another, but of a different kind to that involved in fiduciary relationships.
>
> 7. The contract in question will involve a high degree of communication, co-operation and predictable performance based on mutual trust and confidence, and expectations of loyalty.
>
> 8. There may be a degree of significant investment by one party (or both) in the venture. This significant investment may

> be, in some cases, more accurately described as substantial financial commitment.
>
> 9. Exclusivity of the relationship may also be present.
>
> 726. I hesitate to describe this as an exhaustive list. No single one of the above list is determinative, with the exception of the first one. This is because if the express terms prevent the implication of a duty of good faith, then that will be the end of the matter. However, many of these characteristics will be found to be present where a contract is a relational one. In other cases on entirely different facts, it may be that there are other features which I have not identified above which are relevant to those cases."

258. The emphasis on a relational contract has been the subject of judicial criticism, particularly in recent times. In *UTB LLC v Sheffield United Ltd* [2019] EWHC 2322 (Ch) Fancourt J observed at [202]:

> "… there is a danger in using the term 'relational contract' that one is not clear about what exactly is meant by it. There is a great range of different types of contract that involve the parties in long-term relationships of varying types, with different terms and varying degrees of detail and use of language, and to characterise them all as 'relational contracts' may be in one sense accurate and yet in other ways liable to mislead. It is self-evidently not all long-term contracts that involve an enduring but undefined, cooperative relationship between the parties that will, as a matter of law, involve an obligation of good faith."

259. In *Russell v Cartwright* [2020] EWHC 41 (Ch), Falk J (as she then was) held as follows:

> "87….I agree with Fancourt J in UTB LLC v Sheffield United Ltd [2019] EWHC 2322 (Ch) at [196] to [205] that, rather than trying to identify first whether a contract is a "relational contract" and for that reason includes an obligation of good faith, the better starting point for the reasons he gives is the application of the conventional tests for the implication of contractual terms, as authoritatively restated by Lord Neuberger in Marks and Spencer plc v BNP Paribas Securities Services Trust Co (Jersey) Ltd and another [2016] AC 742 (" Marks and Spencer ") at [16] to [31], that is whether a reasonable reader would consider that an obligation of good faith was obviously meant, or the obligation was essential to the proper working of the contract since it would otherwise lack commercial or practical coherence (the business efficacy test). This was the approach adopted by Leggatt LJ in Al Nehayan when he went on to find in that case,

> where the parties had not tried to specify the details of their collaboration in a written contract and that collaboration "involved much greater mutual trust than is inherent in an ordinary contractual bargain between shareholders", that the implication of a duty of good faith was essential to give effect to the parties' reasonable expectations, and satisfied the business necessity test (see in particular at [173] and [174]). Leggatt J had also adopted that approach in the earlier case of Yam Seng Pte Ltd v International Trade Corp Ltd [2013] EWHC 111 (QB) .

260. Attention was drawn by JBL to a dictum in the Supreme Court in *Times Travel Ltd v Pakistan International Airlines* [2021] 3 WLR 727 in which Lord Burrows at [95] eschewed a general principle of good faith dealing based on a standard of what is commercially unacceptable or unreasonable behaviour. This would be too radical and the uncertainty caused by it was a price not worth paying. This does not prevent the implication of a term of good faith because it provides guidance about a general principle. This case does not concern a general principle, but about whether on the peculiar facts of this case, a term of good faith is to be applied.

261. Further, in the same case at 26-30, Lord Hodge said there was no doctrine whereby inequality of bargaining power in the negotiation of a commercial contract will allow the weaker party to escape from the contract because of socially objectionable conduct. This was in the context of considering duress. English law does not recognise a general principle of good faith in contracting. This also does not prevent taking into account inequality of bargaining power in deciding whether a clause is in restraint of trade. Nor is it authority which prevents consideration of an implied term as to good faith in the operation of the contract.

262. Attention was also drawn to the case of *Uber BV v Aslam* [2021] UKSC 5 at para. 69 that *"...inequality of bargaining power is not generally treated as a reason for disapplying or disregarding ordinary principles of contract law, except in so far as Parliament has made the relative bargaining power of the parties a relevant factor under legislation such as the Unfair Contract Terms Act 1977."* A different approach was adopted because in *Uber*, it was about statutory construction. That said, just as in *Dwyer* inequality of bargaining power was relevant to the question of restraint of trade, so there is reason to take it into account in considering whether there is an implied term. This does not involve ignoring the terms of the agreement or disregarding contractual principles, but considering what a reasonable reader would consider was so obvious as to go without saying or to be necessary for business efficacy.

263. This desire to impose a discipline in each case was evident in the judgment of the Court of Appeal in *Candey Ltd v Bosheh* [2022] EWCA Civ 1103. Having referred to an avalanche of such claims at [31], Coulson LJ stated at [32]:

> "Of course, the mere fact that some relationships are long-term does not make the underlying contract a relational contract: see Fancourt J in UTB LLC V Sheffield United Limited [2019] EWHC 2322 (Ch) 1 . Moreover, as a general rule, it is important not to veer from the test as to implied terms noted above. As

> Beatson LJ observed in Globe Motors Inc v TRW Lucas Variety Electric Steering Ltd [2016] EWCA Civ 396 at [68] :
>
> "…An implication of a duty of good faith will only be possible where the language of the contract viewed against its context permits it. It is thus not a reflection of a special rule of interpretation for this category of contract."
>
> Putting that another way, it might be said that the elusive concept of good faith should not be used to avoid orthodox and clear principles of English contract law."

264. The nine criteria in Bates have been criticised on behalf of JBL as being capable of featuring in many contracts which could not properly be described as "relational" or involving close collaboration and cooperation. Like criticisms were made in the article of Professor Davies and Lord Sales in the extra-judicial article in 104 LQR 106 (January 2024) *"Controlling contract discretions: Wednesbury reasonableness, good faith and proper purposes."*

265. The Claimants have relied upon a lecture of Lord Leggatt to the Commercial Bar Association of 2016, which has been often cited. He said:

> "It may be said that employment contracts are a special case. I do not see why that should be so when we are looking, not at legislation in the employment field, but at a development of the common law. The common law strives for coherence at the level of principle and, if relevant characteristics of employment relationships are also found in other contractual relationships, they should be treated similarly."

(e) Code of Ethics

266. In submitting that an implied term of good faith exists, the Claimants have sought to rely upon the Code of Ethics for Franchising of the British Franchise Association ("the BFA"). Its origin was from the European Code of Franchising over a period of 40 years. It provided *that "the overarching principles of ethics that underline this set of provisions are good faith and fair dealings call my which translators franchisor - franchisee relations based on fairness, transparency and loyalty each which contribute to founding confidence in the relationship."* It stated that *"the principles of the code are applicable at all stages of the franchise relationship: pre contractual, contractual and post contractual stages."*

267. A part of the commitments of the franchisor was to recognise that their franchisees as independent entrepreneurs are not directly or indirectly to subordinate them as employees. A part of the commitments of each franchisee was of (a) collaborating loyally with the franchisor and ensuring the success of the network, (b) devoting best endeavours to the growth of the franchise business and the maintenance the common

identity and reputation of the franchise network and (c) loyally acting with regard to each of the other franchisees as well as the network itself. In adopting this, the BFA emphasised that the franchise relationship was governed by the franchise agreement and franchisees were independent contractors and so the franchise also must treat franchisees as independent business operators running their business at their own discretion in their own risk. Whereas the relationship between the employer and employee or worker is governed by employment law, the franchise relationship was not.

268. The problem about this analysis is that JBL is not a member of the BFA. Although there are many franchisors who are members of the BFA, it was not suggested that these terms had become customs of the industry. And there was no evidence that most of the driving instructing schools were members of the BFA. In these circumstances, there is no reason to imply compliance with the Code of Ethics for Franchising of the BFA into the franchise agreements.

(f) Commonwealth cases

269. The next stage of the analysis of the Claimants was to refer to Canadian and Australian statutory and common law material as regards duties imposed on franchisors. Reference was made to the Competition and Consumer (Industry Codes-Franchising) Regulations 2024 in Australia. In section 15, reference is made to a franchising code of conduct whose purpose is to regulate the conduct participants in franchising towards other participants in franchising, and especially to address the imbalance of power between franchisors and franchisees and prospective franchisees. It is to improve standards of conduct and practice in the industry particularly for better disclosure of information, to inform decision making and to set out requirements for franchise agreements.

270. At section 18, there is set out an obligation of each party to a franchise agreement to act towards another party with good faith in respect of any matter arising under or in relation to the franchise agreement and this code. Regard may be had as to whether the person acted honestly and not arbitrarily, and whether the party cooperated to achieve the purposes of the agreement. There must be no clause limiting or excluding the obligation to act in good faith. None of this prevents a party from acting in their own legitimate commercial interests.

271. The Court was also shown statutory provisions in Saskatchewan in Canada comprising the Franchise Disclosure Act 2024. This included a provision of fair dealing that every franchise agreement imposes on each party of duty of fair dealing in the performance and enforcement of the franchise agreement, including in the exercise of a right under the franchise agreement: see section 4(1). Similar provisions about fair dealing appear in the Arthur Wishart Act (Franchise Disclosure) Act 2000 in Ontario: see section 3.

272. Whilst these are enactments applying only in Australia and parts of Canada, Mr Stephens emphasised that they had their origins at common law. In *Far Horizons Pty limited V McDonald's Australia Limited* [2002] VSC 310, the Supreme Court of Victoria followed the decision of the New South Wales Court of Appeal in *Renard Construction (ME) Pty Ltd v Minister for Public Works* (1992) 26 NSWLR 234. This

was to the effect that (at para. 120) *"there is to be implied in a franchise agreement a term of good faith and fair dealing which obliges each party to exercise the powers conferred upon it by the agreement in good faith and reasonably, and not capriciously or for some extraneous purpose. Such a term is a legal incident of such a contract."*

273. Reference was made to a Privy Council case of *Dymocks Franchise Systems (NSW) Pty Ltd v Todd and others* [2002] UKPC 50 at paras. 55-57. This was an appeal from the Court of Appeal of New Zealand which decided that a difficult question of NSW law should not have been decided by the first instance judge without expert evidence. The question was whether there was an obligation of good faith in a franchising agreement.

274. The New Zealand Court of Appeal had suggested that there was no room for super-imposing a general duty of good faith and to do so conflicted with requirements of certainty in commercial contracts, and that franchising agreements are not analogous to employment contracts. The Privy Council said about this that they proposed to *"express no concluded view on these comments and wish to reserve their opinion on the suggestion that the implication of an obligation of good faith in the relationship between franchisor and franchisee would be an undesirable development"* (at para. 55).

275. As to the content of the duty of good faith, this was set out in the case of *Paciocco v Australia and New Zealand Banking Group Ltd* [2015] FCAFC 50 where Allsop CJ said:

(1) the obligation of good faith was *"an obligation to act honestly and with a fidelity to the bargain; an obligation not to act dishonestly and not to act to undermine the bargain entered or the substance of the contractual benefit bargained for; and an obligation to act reasonably and with fair dealing having regard to the interests of the parties (which will inevitably, at times conflict) and to the provisions, aims and purposes of the contract, objectively ascertained* (para. 288);

(2) the duty does not require the interests of a contracting party to be subordinated to those of another but is rooted in the bargain (para. 289);

(3) *"good faith does not import an equitable notion of the fiduciary that is rooted in loyalty to another in the service of her or his interests… it is rooted in honest and reasonable fair dealing."* (para. 292).

276. The case of *Esso Australia Resources Ltd v Southern Pacific Petroleum NL* [2005] VSCA 228 contains pertinent dicta about an implied term of good faith being an implication as a matter of fact rather than creating a legal incident of contracts of a certain type. In the judgment of Warren CJ, *"… the interests of certainty in contractual activity should be interfered with only when the relationship between the parties is unbalanced and one party is at a substantial disadvantage, or is particularly vulnerable in the prevailing context. Where commercial leviathans are contractually engaged, it is difficult to see that a duty of good faith will arise, leaving aside duties that might arise in a fiduciary relationship."*

277. In the same case in the judgment of Buchanan J at para. 25 said that whilst there might not be an implied term of good faith in commercial contracts, *"it may… be appropriate in a particular case to import such an obligation to protect a vulnerable party from exploitive conduct which subverts the original purpose for which the contract was made. Implication in this fashion is perhaps ad hoc implication meeting the tests laid down in BP Refinery (Westernport) Pty Limited v Shire of Hastings (1977) 180 CLB 266, rather than implication as a matter of law creating a legal incident of contracts of a certain type."*

(g) Implied term in fact

278. The cases from the case of*Yam Seng Pte*, where an implied term of good faith, have more commonly implied the term in fact rather than in law. In those cases, the exact factual relationship and the agreement are analysed carefully to determine whether an implied duty of good faith might arise. There is no reason easily to borrow from foreign systems of law which appear to have gone down a route of extending good faith to certain types of contract which traditionally have not been the subject of good faith duties. The Court should not cherry pick quotations about good faith from foreign systems of law, even based on the common law, where they appear to have taken a different turn from the courts of this jurisdiction.

279. The implied term in fact has been referred to in the *Yam Seng Pte* and subsequent jurisprudence, some of which has been referred to above including:

(1) despite the expansiveness of *Yam Seng Pte* and the reference to relational contracts including franchise agreements, Leggatt J adopted implied terms in fact rather than law. He did so again in the case of *Al Nehayan.* As Falk J remarked in *Russell v Cartwright*, the implication of a duty of good faith was regarded as essential to give effect to the parties' reasonable expectations and satisfied the business efficacy test.

(2) in *Globe Motors,* Beatson LJ referred at [67], ((by reference to *Yam Seng Pte)* to contracts involving a high degree of communication, co-operation and predictable performance based on mutual trust and confidence and expectations of loyalty *"which are not legislated for in the express terms of the contract but are implicit in the parties' understanding and necessary to give business efficacy to the arrangements"*. He gave as an example franchise agreements, but by reference to subsequent cases, he said that the position will depend on the terms of the particular contract.

(3) whilst most of the Commonwealth authority is about the implication of a term in law, in *Esso Australia Resources*, there were dicta about implying a term of good faith as a matter of fact rather than creating an incident of contracts, particularly in unbalanced contracts, to protect a disadvantaged or vulnerable party from conduct of the powerful party which might subvert the original purpose of the contract.

280. The development of the law by reference to an implied term in fact has not ignored the restrictive nature of the test for an implied term being one of necessity. That is apparent from the *Marks and Spencer* case. A particular feature identified by JBL is that whether a term is to be implied is to be judged at the date when the contract is made: see Lord Neuberger at para. 23. The matters on which reliance has been placed are the terms of the agreement and the contractual matrix at the time when the agreement was entered into. Further, the test for an implied term of fact is if a 'reasonable reader' reading the contract at the time it was made 'would consider the term to be so obvious as to go without saying or to be necessary for business efficacy.'. The tests of 'business necessity' and 'obviousness' are not cumulative but 'alternatives in the sense that only one of them needs to be satisfied'.

281. In considering the tests of necessity and the officious bystander test, a particularly important part of the judgment of Lord Neuberger in the *Marks and Spencer* case is his para. 21 as follows:

> "In my judgment, the judicial observations so far considered represent a clear, consistent and principled approach. It could be dangerous to reformulate the principles, but I would add six comments on the summary given by Lord Simon in BP Refinery as extended by Sir Thomas Bingham in Philips and exemplified in The APJ Priti. First, in Equitable Life Assurance Society v Hyman [2002] 1 AC 408, 459, Lord Steyn rightly observed that the implication of a term was "not critically dependent on proof of an actual intention of the parties" when negotiating the contract. **If one approaches the question by reference to what the parties would have agreed, one is not strictly concerned with the hypothetical answer of the actual parties, but with that of notional reasonable people in the position of the parties at the time at which they were contracting.** Secondly, a term should not be implied into a detailed commercial contract merely because it appears fair or merely because one considers that the parties would have agreed it if it had been suggested to them. Those are necessary but not sufficient grounds for including a term. However, and thirdly, it is questionable whether Lord Simon's first requirement, reasonableness and equitableness, will usually, if ever, add anything: if a term satisfies the other requirements, it is hard to think that it would not be reasonable and equitable. Fourthly, as Lord Hoffmann I think suggested in Attorney General of Belize v Belize Telecom Ltd [2009] 1 WLR 1988, para 27, although Lord Simon's requirements are otherwise cumulative, **I would accept that business necessity and obviousness, his second and third requirements, can be alternatives in the sense that only one of them needs to be satisfied, although I suspect that in practice it would be a rare case where only one of those two requirements would be satisfied.** Fifthly, if one approaches the issue by reference to the officious bystander, it is "vital to formulate the question to be posed by [him] with the utmost care", to quote from Lewison, The Interpretation of

> Contracts 5th ed (2011), para 6.09. **Sixthly, necessity for business efficacy involves a value judgment. It is rightly common ground on this appeal that the test is not one of "absolute necessity", not least because the necessity is judged by reference to business efficacy. It may well be that a more helpful way of putting Lord Simon's second requirement is, as suggested by Lord Sumption in argument, that a term can only be implied if, without the term, the contract would lack commercial or practical coherence."** (emphasis added)

282. In a case of inequality of bargaining power and even sharp practice, it would be unlikely that the more powerful person would say, if asked, that an implied term as to good faith is required. The importance of the test "being what notional reasonable people in the position of the parties at the time at which they were contracting" informs as to the answer. The notional reasonable person would be asked if the implied terms as to good faith and fair dealing would be implied into the agreement. It is a value judgment, as Lord Neuberger said, but a notional reasonable person would say that it was necessary and obvious to imply such terms in the context of these franchise agreements in order for them to have commercial or practical coherence.

283. The importance of trust and confidence on the facts of this particular relationship was so stark that it was confirmed by Mr Benson in evidence. JBL is not bound by any of the above answers. The question of implication of a term does not depend on what the owner of the franchisor concedes many years after the franchise agreements. Despite this, the evidence of Mr Benson was an inevitable reflection of the nature of these franchise agreements. It was not about franchise agreements generally, but about these specific agreements.

284. Mr Benson said in cross-examination that most of the franchisees had not been in business before. He accepted that there was a significant financial outlay to get into the business. It might cost about £3,500 in training fees. There might be a period of a year or more or spent attempting to qualify as a driving instructor. Success was not guaranteed. Not everybody succeeded. Mr Benson accepted that the franchisee was taking a risk. Mr Benson recognised that new franchisees make a long-term commitment. After a period to enable the franchisee to qualify, there would be a minimum term, usually three years without the opportunity for early termination.

285. All contracts were personal to the individual franchisee. The terms are standard terms, and generally there is no scope for negotiation. It is possible to have a longer term on the basis that a longer term will involve lower fees. However, this then led to minimum terms of up to 10 years.

286. Mr Benson accepted that there was trust between him and the franchisees. He said that they trusted him and he trusted them. This was so obvious that it did not to be said in the contract. His success was their success and their success was his success. Not everything was written in the agreement. There was trust, respect and fair dealing between the parties. The franchisees were entitled to expect that he would conduct the business lawfully, and he was entitled to expect that the franchisees would behave with integrity. Without total trust, the relationship would not be as strong. There was no

need to say that racism would not be tolerated. That was obvious, and in fact it was stated in the Handbook on the subject of Facebook *"DO NOT use any offensive language OR post any radical/racial or similar postings."*

287. If it had been the case that the subsequent implementation of the agreement was relied upon, that would not pose a problem for at least ten of the seventeen Claimants represented before the Court and for twelve of the twenty Claimants. The operative agreement was subsequent to an earlier agreement and so the operation of the earlier agreement would be a part of the relevant factual matrix. In the event, I am satisfied that the implied terms are established by reference to the facts in existence at the time of each agreement whether the agreement was the first or a subsequent agreement of the franchisee with JBL.

288. A concern may be expressed that if a franchise agreement is to have imported the implied terms contended for, the certainty of commercial relationships and freedom of contract are compromised. It may be said that in a business context, absent statutory protection, there ought to be no reason to protect a business person from their own folly or improvident bargain. It may also be said that the reasoning in this case opens the gates to an avalanche of other such claims which are undesirable in a business relationship.

289. The answers to this are, in my judgment, clear. They are as follows:

(1) every case must turn on its own particular facts, and the facts in this case are particular and peculiar and not necessarily frequently replicated;

(2) this is not a case decided on the basis of a mere relational contract: the decision is because of a confluence of factors including inequality of bargaining power, a standard form agreement heavily stacked in favour of the franchisor and findings about the way the nature of the particular bargain. In this way the implied terms have been subjected to the relevant tests for implication of terms at the start of a contract.

(3) based upon developing jurisprudence and without the need for incremental development the court has applied the existing law to the facts of this case. The case of *Dwyer* in the Court of Appeal is an example of where in a franchising context records have had regard to the impact of inequality of bargaining power and standard forms to conclude that a franchising agreement could be treated as closer to an employment contract then to a lease of goodwill or a vendor or purchaser agreement.

(4) the contracts were entered into in circumstances of inequality of bargaining power, with the agreements being unbalanced, the Claimants being disadvantaged without legal representation and vulnerable to the conduct of JBL in the event of no terms as to good faith and fair dealing being implied.

290. Whilst the court cannot be prescriptive of how such agreements may be less amenable to such implied terms, it is possible to imagine ways that would make the agreements very different from the instant agreements, namely:

(1) a requirement that a franchisee does obtain independent legal advice particularly if they lack business experience or are otherwise disadvantaged;

(2) avoiding terms which appear oppressive such as a very long-term agreement without an obvious commercial justification, and without allowing the franchisee to terminate early;

(3) not conducting the franchise in such a way that the franchisee is in effect unable to market their own business.

291. In the light of the totality of these points, which are not aspects of franchise agreements generally, I have come to the conclusions that:

(1) there should be implied as a matter of fact i terms of good faith and fair dealing.

(2) notional reasonable people in the position of the parties at the time at which they were contracting, if asked about the implied terms as to good faith and fair dealing, would say that it was necessary and obvious to imply such terms in the context of these franchise agreements in order for them to have commercial or practical coherence.

(3) further or in the alternative, in view of the points about vulnerability of the franchisees, inequality of bargaining power, unbalanced relationship as well as a relationship with cooperation and collaboration, it was obvious that such terms should be implied and/or it was reasonably necessary for the bargain.

(4) it is not necessary to consider whether there is scope for an implied term in law of good faith to be imported into franchise agreements generally as per the decisions in Australia, but looked at in respect of the various peculiar features in this case as identified above, the Court will imply a term in fact as to good faith between these parties.

(5) having regard to how akin the relationship was to an employment relationship and/or the particular features of this relational contract, there was an implied term in fact of good faith. The features included :

(a) inequality of bargaining power,

(b) the degree of dependency of the franchisees on the franchisor in the implementation of the agreement and the referring of work,

(c) the degree of control of the franchisor over the franchisees both as per the terms of the agreement and in the implementation of the agreement,

(d) the extent to which the franchisees had to observe the instructions of the franchisor on a regular basis.

(6) the term of good faith complies with the restrictive test of a term that went without saying or a term necessary to give business efficacy to the agreement. Examples of it are that it is capable of operating so as to make intimidatory

> conduct or an attempt unilaterally to vary an agreement a breach of contract. In the context of an agreement which is akin to an employment contract and/or is a long-term agreement based on cooperation and collaboration, the obligations are no greater than necessary to make the agreement work.

(h) Implied term in law

292. There is a distinction between terms implied in law and terms implied in fact. As to a term implied in law, it would be that a particular kind of relationship will give rise to an implied term in law. An example is an employment relationship in which there will be an implied term in law as to trust and confidence: see *BCCI v Malik and Mahmud* [1998] AC 20, especially in the speech of Lord Steyn who said:

> " The employees do not rely on a term implied in fact. They do not therefore rely on an individualised term to be implied from the particular provisions of their employment contracts considered against their specific contextual setting. Instead they rely on a standardised term implied by law, that is, on a term which is said to be an incident of all contracts of employment: Scally v. Southern Health and Social Services Board [1992] 1 A.C. 294, 307B. Such implied terms operate as default rules. The parties are free to exclude or modify them."

Malik was the first acceptance of the implied term in law in the House of Lords.

293. The Claimants submitted that the time had been reached to have an implied term in law of trust and confidence in a franchise agreement. The preponderance of their submissions in that regard was by reference to Australian and Canadian law as referred to in the preceding section. The foundation of the duties was cooperation and collaboration at the heart of the relationship and to address a significant imbalance of power between the parties. This was supplemented by statutory duties in some States to reflect or buttress the spirit of the development of the law at common law. These were duties in every franchise agreement rather than a more traditional analysis case by case to find an implied term or duty in fact. Whilst the Privy Council had not expressed a view about this in *Dymocks Franchise Systems (NSW) Pty Ltd v Todd and others* [2002] UKPC 50, the weight of the Commonwealth authorities and the cases about the implied term of good faith in English law in recent years allowed for the Court to recognise the implied term in law in a franchise agreement.

294. In Chitty on Contracts 35th Ed. at para.2-099 under the heading "term implied in fact or term implied in law", the following appears:

> "It is submitted that there remains a degree of ambiguity in the approach of the courts in their application of the line of authority following Yam Seng Pte Ltd as to whether a term requiring good faith is implied in law or in fact. Sometimes it is said to be implied in fact (as was apparently the case in Yam Seng Pte

> Ltd itself), but sometimes it appears to be implied in law, that is, implied as an incident consequential on a finding that the contract before the court is a "relational contract".

295. I therefore consider in the alternative an implied term in law. The question arises whether there is an implied term of good faith in every contract between a franchisor and a franchisee. The Claimants invite the Court to say that the time has come to follow the Commonwealth authorities referred to above, and to conclude that necessary incidents of the franchise relationship are good faith and fair dealing. I do not exclude the possibility of another decision along the lines of the Australian cases implying such a term in law. There are signals to this effect in the *Yam Seng* case, and it is stated expressly in some of the Commonwealth cases based on their law.

296. There are problems with this analysis. There is no concluded decision in these courts to the effect that terms of good faith and fair dealing should be implied as matter of law as an incident of all franchise agreements. It is significant that even almost a quarter of century ago the New Zealand courts had said that there was no basis for such terms to implied as a matter of law into franchise agreements (despite Australian cases saying that such terms were implied in Australia or in states of Australia). Further, the Privy Council in *Dymocks* declined to express a view about whether this was the case or not.

297. I am not satisfied on the basis of the law as it stands that it has reached a stage where such an implied term as a matter of law can be implied into every franchise agreement. I prefer to rest my decision on a term implied on the facts peculiar to this case. I am prepared to assume that most, or at least a substantial proportion of, franchise agreements would be commercial agreements not akin to an employment relationship, and where there would be less control than in the instant case. This case is different because of its peculiar facts.

298. There may be a possibility of implying a term in law on the basis of categorising this into a sub-set of franchise agreements, that is to say one which is akin to an employment agreement without actually being an employment contract. The argument would then go that there would be implied terms of good faith and especially of trust and confidence, arising from the fact that the franchise agreement departs from the norm in that it is so close to an employment relationship. The argument is that as a matter of law, it should bear the same implied terms. The problem here is that in order to identify on this limited basis the existence of an implied term in law, there has to be first a detailed investigation of fact. There is a problem of definition, and there is a high degree of overlap with implied terms as to fact. The current direction of the law as discerned from *Yam-Seng, Globe Motors, Al Nehayan, UTB LLC v Sheffield United Ltd and Russell v Cartwright* all referred to above is in favour of an implied term in fact rather than in law. Whilst Chitty is correct in discerning an *"a degree of ambiguity in the approach of the courts in their application of the line of authority following Yam Seng Pte Ltd as to whether a term requiring good faith is implied in law or in fact",* the general drift is in favour of an implied term in fact.

299. In this case, the Court prefers to rest its decision on implied terms as to fact and not to make a finding one way or the other about an implied term in law either as regards franchise agreements generally or about a sub-set of franchise agreements which are

akin to employment agreements or are called relational contracts because of a combination of the following points or any of them, namely (a) the length of the contract, (b) the need for constant cooperation and collaboration, (c) the features which make it akin to an employment contract, (d) the degree of control, (e) the inequality of bargaining power and the lack of balance.

300. The openings in this case were principally directed as to whether or not as a matter of law, the alleged implied terms formed a part of the franchise agreements. A submission referred to above on the part of JBL was that in the event that the court decided that there were no such implied terms, it should so hold and then the case would fall away. The court refused to do this in part because it wished to understand more about the franchise agreement and their context and the nature of the relationship between the parties. It is apparent from the above analysis that this has been necessary, particularly because the court in the end has decided the first issue by reference to an implied term in fact rather than in law. For the reasons above, I have come to the conclusion that the instant franchise agreements were subject to implied terms of good faith.

(i) The scope of the implied terms

301. The next question is what is required to be implied to give effect to the implied term of good faith, what should be the implied term? Para. 6 of the POC has been set out above containing five implied terms. The origin of para. 6 can be seen from the judgment of Leggatt LJ (as he then was) in *Sheikh Al Nehayan v Kent* at para. 175 above, particularly relying on the implied terms at paras. 6d and 6e.

302. On the peculiar facts of the instant case, I find that there was an implied term of good faith just as an implied term of trust and confidence is implied by operation of law in an employment agreement, so here the consequence of the particular relationship between these franchisees and this franchisor is that it ought to have the term implied in fact of trust and confidence.

303. As regards the other terms, it is accepted that any discretion should not be exercised arbitrarily or capriciously. The first two implied terms are capable of being implied as being about not derogating from the bargain and/or not undermining the bargain. The real battleground in this case is the fourth and fifth implied terms, being aspects of the obligation of good faith as referred to by Leggatt J in *Sheikh Al Nehayan v Kent [2018] EWHC 333 (Comm)* Al Sheikh at [175] as set out above. Having found that there was an implied term of good faith, I am satisfied that these two terms give effect to the implied term of good faith.

304. JBL has sought to say that the nine features in *Bates* do not advance the reasoning, because those features might be satisfied even in a case where there is no question of an obligation of good faith. It is noted that this comment comes from the above mentioned article of Professor Davies and Lord Sales in the Law Quarterly Review. It is accepted that the indicia identified in *Bates* may not advance the reasoning further because of the criticisms of their application outside the case of *Bates* where Fraser J used it as a method to come to the resolution in favour of the postal workers in a very unusual case.

305. I have considered whether there is anything in the application of those criteria which negatives the proposed implied terms. In particular, the first of the nine, namely no express terms preventing the duty from arising, in my judgment, there is nothing in the express terms which prevents implying a term of good faith. Nothing has been identified among the terms of the agreement which does negative good faith. The rudimentary entire agreement clause does not prevent the implication of the terms contended for: see Chitty on Contracts 35th Ed. at para. 17-020 which states that an entire agreement clause does not generally affect or prevent the implication of a term as a matter of fact on the basis of necessity (or obviousness) in that the implicaton is simply giving effect to the true intention of the parties. Further, none of the other terms of the franchise agreements expressly exclude or are inconsistent with the implied terms. The agreement is very different from long complex commercial agreements, and the implied terms do not cut across the terms of the contract as was the case in *Carewatch:* see para. 254 above. As regards the second characteristic in *Bates*, whilst there are many longer term agreements, the length of the instant agreements against what would be necessary to amortise any investment makes it long-term for these purposes.

306. As regards the other items in *Bates*, the Claimants emphasise that they have a resonance in the Handbook about being straight with each other, about pulling together and about help and support. It is not necessary to look to the Handbook for this. These are obvious features of this long-term relationship. There is no profit in going through the parties' submissions as to the application or non-application of the nine criteria of Fraser J in *Bates* as if this was a statutory interpretation. It suffices to say that none of the features are contra-indications of the existence of an implied term.

307. It will be recalled above how there are clauses in the franchise agreements said to be bearing many of the hallmarks of an employment agreement and showing some degree of control of JBL/Mr Benson over the franchisees. Derived from this, the Claimants plead the following at para. 5 of the Particulars of Claim that the franchise agreements *"involved long-term commercial relationships requiring a high degree of communication, co-operation and predictable performance with expectations of loyalty. They were relational contracts under which the parties owed a duty to conduct themselves in good faith and to deal fairly with one another."*

308. Returning to the case of *Dwyer*, the fact that a franchise agreement is of a standard form does not make it necessarily more akin to an employment contract. It is readily understandable that a franchisor will want uniformity in the nature of the contractual terms of the franchisees in order to maintain and develop the goodwill of the business of the franchise. It is also in order to be able to promote the business without accusations of favouritism and inequality among the franchisees. Nonetheless, the fact that the agreement is on a take it or leave it basis may be a factor in the context of the relationship as a whole as indicating inequality of bargaining power.

309. In circumstances where the agreements are very seriously imbalanced, where there is a serious inequality of bargaining power, where the franchisees are disadvantaged and vulnerable, and where there is a long-term agreement requiring collaboration and cooperation, I am satisfied that the franchise agreements satisfy the implied term in fact in the words of Falk J in *Russell v Cartwright "whether a reasonable reader would consider that an obligation of good faith was obviously meant, or the obligation was essential to the proper working of the contract since it would otherwise lack commercial*

or practical coherence (the business efficacy test).” This was the approach adopted by Leggatt LJ in *Al Nehayan* where the implication of a duty of good faith was essential to give effect to the parties' reasonable expectations, and satisfied the business necessity test.

310. The Claimants submit that where a franchise agreement on its own facts is more akin to an employment agreement than the usual commercial setting of a franchise agreement or than a vendor purchaser/leasing agreement, then in an appropriate case, the Court will imply a term of good faith. That is not an extension of the law, but if it is new, it is an incremental development. An aspect of that term may replicate the implied term in an employment contract, that it will not without reasonable and probable cause, conduct itself in a manner calculated to destroy or seriously damage the relationship of confidence and trust between franchisor and franchisee. Like *Dwyer,* it does not change at a stroke the general nature of the relationship of a franchise agreement, but it responds to the facts and matters of the instant case. An alternative is the implied term to refrain from conduct which in the relevant context would be regarded as commercially unacceptable by reasonable and honest people.

311. The submissions on behalf of the Claimants are to the effect that most of these indicia are met because of the terms of expressions in the Handbook such as *“be straight with me and I will be straight with you” and “I will always act in your best interests”.* As examples of collaboration, collective language was used such as *“we all need to succeed and profit”* and *“will all “pull together” and “we ALL must work together”.* The School recognised that both parties would make significant investments: *“you investing in Benson school of motoring and us investing in you”* and references to *“noteworthy investments to ensure this company's continued success".*

312. It is right to be cautious about reference to the Handbook because of the entire agreement clause in the franchise agreements (Clause 12). That is a correct approach, but the Handbook can be treated as a part of the factual matrix of the franchise agreements and is expressly referred to in the agreement at the end of clause 12. It can be taken into account in construing the contract without itself containing separate contractual obligations. It is not necessary to rule on the submission of the Claimants that the words in the Handbook give rise to express obligations in addition to those contained in the franchise agreement, albeit that compliance with it is said in the Handbook to be required.

313. None of the above stands in the way of the implication of an implied term of trust and confidence in the instant franchise agreements. The reasons are as follows:

(1) for reasons set out in detail above, the instant agreements are far closer to contracts of employment than to commercial agreements;

(2) prior to recent case law the courts characterised a franchise agreement generally as being more akin to a vendor or purchaser agreement or a leasing agreement then to a contract of employment. That said, there are cases where franchise agreements might be more akin to an employment relationship: see *Dwyer*.

(3) it is said that cases such as *Dwyer* only justify finding that a covenant in restraint of trade might be treated with the same tenderness as is traditionally reserved for an employee, it does not justify implying a term of trust and confidence. If

on peculiar facts, a franchise agreement can be treated as akin to an employment contract or as a relational contract with the features identified in this case, there is no reason to limit the consequence of that characterisation to whether it is in restraint of trade. In an appropriate case, and depending on an intense scrutiny of the facts, there might be imported implied terms of good faith as with a contract of employment;

(4) it is said that the facts in Dwyer were extreme and therefore not of general application. Whilst they were peculiar, the facts in the instant case are also peculiar;

(5) whilst the expansive approach of Commonwealth cases to an implied term in law is not being followed, the approach of the Court of Appeal of Victoria in *Esso Australia Resources Ltd v Southern Pacific Petroleum NL* [2005] VSCA 228 does contain pertinent dicta about an implied term of good faith being an implication as a matter of fact rather than creating a legal incident of contracts of a certain type. It was relevant in that case that "*the relationship between the parties is unbalanced and one party is at a substantial disadvantage, or is particularly vulnerable"* That was a case adopting the same approach to implied terms as cases in the UK courts, especially in its reference to the Privy Council case of *BP Refinery;*

(6) for the reasons set out in this judgment in detail above, I am satisfied that that it is appropriate to imply a term as to trust and confidence;

(7) the term should be implied in fact because it satisfies the tests of the presumed intention of the parties and/or the necessity test for the reasons above set out;

(8) whilst the implied term of trust and confidence may have been fashioned around the statutory remedy of unfair dismissal, it has assumed a broader traction such that it would apply in a common law claim. It would be artificial to restrict an implied term of trust and confidence in an employment agreement but to find that there was no such implied term in a contract akin to a contract of employment with no express terms negativing the implication;

(9) in any event the case law since *Yam-Seng,* despite caution in some recent cases, is in the direction of implying terms of good faith in a contract which has characteristics akin to an employment contract and/or a relational contract with the features which have been set out above.

314. Applying this to the instant case, the implied duty of trust and confidence as an implied term is a shorthand. As is clear from *Malik* and other authorities, the implied term is that the party having that duty is obliged *"not to conduct itself, without reasonable or proper cause, in a manner likely to cause serious damage to the relationship of mutual trust and confidence."* The very statement of the term confines it to conduct likely to cause serious damage to the relationship. The implied terms as to good faith arise because the instant contracts are more akin to contracts of employment than to commercial contracts and/or because the instant contracts are relational contracts in which a high degree of cooperation, collaboration and communication are required.

(j) JBL's further reflections on implied terms

315. In a supplemental submission dated 17 April 2025, JPL has made detailed submissions under the heading "D's further reflections on the contractual ramifications of objectionable behaviour." The word 'objectionable' is said to be in distinction to 'commercially unacceptable' behaviour of the kind which is sometimes said to characterise the obligation to act in good faith. The suggestion is that the claimants are seeking to use an implied term to go beyond that which has ever been done before. It is referred to as a "radical development".

316. First, the submission is predicated upon the conduct in question being characterised as "objectionable", which is said to be another word for "antisocial" and "unethical". This is a value judgment about how JBL say that the alleged behaviour should be characterised. It is therefore said to be different from "commercially unacceptable" conduct. The Claimants' cases invite the Court to characterise the conduct differently. They recognise that the implied terms, particularly conducting themselves (a) in a manner regarded as commercially unacceptable by reasonable and honest people, and/or (b) without reasonable and proper cause, in a manner likely to cause serious danger to the relationship of trust and confidence, set the bar higher than conduct which is merely objectionable or antisocial.

317. The notion that this is a radical development is without a basis. The term as to trust and confidence has been applied in the workplace in employment cases. Likewise, in certain kinds of relational contacts both kinds of implied term have been applied, and context is everything. This is the answer to the suggestion that distinctions have to be made between different industries, different relationships, different sensibilities and different levels of contact. All of this can be taken into account. The more egregious the alleged behaviour and/or the more protracted and endemic it is, the less these distinctions will matter.

318. It is said that there are other sources of protection such as under statute (Protection from Harassment Act 1997 and the Equality Act 2010) and at common law (the tort of intimidation) and that they are sufficient to regulate the conduct. There is no reason why there cannot be concurrent wrongs: see *Spring v Guardian Assurance* [1994] UKHL 7; [1995] 2 AC 296. Further, the contractual term serves a purpose, particularly because it brings with it remedies which might not exist under the statutes and the tort identified above. This includes the ability to terminate for breach where the breach is repudiatory, and, in other cases, the ability to claim loss of profit under the contract.

319. It is also right to say that the fact that conduct may be discriminatory does not by itself make it repudiatory: see *Amnesty International v Ahmed* [2009] ICR 1450. This is why the analysis about closely related breaches of a similar character is so telling about the character of the breaches as a whole going to the root of each of the contracts of the Claimants. This will be considered in more detail in respect of the sections below about breaches and repudiatory breach.

320. There is also concern about an implied term in law, for example, it is said that implied terms of good faith might be inapplicable to many franchise agreements. This issue is left open, but the analysis of an implied term in fact has been considered in detail above. The Court has considered the article of Elisabeth Peden in "Policy concerns behind implications of terms in law" from 2001 LQR Vol 117 pp. 459-476. As noted by JBL,

this article was referred to in the case of *Crossley v Faithful & Gould Holdings Ltd* [2004] EWCA Civ 293 (the correct paragraph is para. 36), raising questions of reasonableness, fairness and the balancing of competing policy considerations.

321. Among other things, the article raised issues of the relative bargaining position of parties which is *"an underlying concern in judgments. The Courts are more likely to impose an obligation on the party in the stronger position, to protect the weaker party. For example, the House of Lords in Irwin stressed the fact that the tenancy agreement was very one-sided, as it only listed the obligations of the tenant."* (*Irwin* is the case of *Liverpool City Council v Irwin* [1976] UKHL 1; [1977] AC 239.) These factors only reinforce the matters set out in this judgment. There has to be a note of caution which is that this learning has to be considered subject to the later jurisprudence, notably the case of *Marks and Spencer v BNP Paribas* above and the cases about the implied term of good faith, which have been considered and applied in this judgment.

XII The second preliminary issue: breach of express or implied terms

(a) Introduction

322. On the premise that the implied terms have been found to exist, the questions of good faith and fair dealing of JBL through Mr Benson have been highly relevant. The Court has taken into account the submissions made by Mr Andrew Butler KC on behalf of JBL. He rightly submits without discourtesy that the Court should operate in the 'real world'. It should not expect a standard of angels in judging conduct in the workplace. It realises that from time to time there can be a robustness of language. There can be a toughness of approach in order to protect and preserve a business. Employees can be spoken to in a stern manner with a view to improving their conduct.

323. That said, there is a dividing line between conduct described in the previous paragraph and conduct which is intimidatory, aggressive, abusive and bullying. The problem about conduct of that kind is that it can undermine people's confidence, make them deeply unhappy and /or even suffer mental health problems. This has been the territory in which the court has had to consider the conduct of Mr Benson vis-a-vis the franchisee Claimants. In the course of his evidence, when it was put to him that some of the Claimants suffered from mental health problems, he said that it suited them to say that. That said more about Mr Benson than about those franchisees who did suffer.

324. As noted above, the breaches of contract are not because the parties entered into the agreements which they did, however improvident. The breaches are not because JBL operated the agreements according to their terms.

325. In its analysis, the Court has had to consider the power and effect of the common breaches said to be repudiatory. It has also had to consider the fact that some of the Claimants have been more impressive than others. It has to consider where specific allegations have not been proven whether that undermines the case more generally either of that franchisee or affecting other franchisees. Usually, one might expect in a case such as this that each and every franchisee must be considered separately. That has been undertaken.

326. There is the danger in this case that the solicitors who acted, namely Aquabridge Law, sent generic letters in which they made substantially the same allegations for all of the franchisees without breaking it down franchisee by franchisee. In another case that might have been fatal, but the question in this case is whether the case can be sustained as a repudiatory breach on that basis of commonality of allegation.

(b) Derogatory comments and racism

327. Mr. Benson used Facebook to make derogatory comments about female instructors. Of one person identified at para. 10(iii) of the Particulars of Claim, he called her in a posting of 10 May 2019 "*a wrinkled old bag covered in moisturiser".* Of a former instructor, also identified in the same paragraph of the statement of case, he called her a "*a nasty piece of work".*

328. Mr. Benson used the same forum on 14 October 2019 to publish racist slurs against Gypsies and Irish Travellers *("pikes").* It is an admitted fact that on various occasions, Mr Benson placed posts on the JB Facebook which referred to "pikes" or "pikeys".

329. Mr Benson referred to a Chinese former franchisee as a *"pussy chow mein"*. He said that this was a reference to a Chinese dish and it was not meant to be offensive. He said that it was not directed at the particular instructor in question, but was said to an instructor about him. In fact, this was upsetting to numerous franchisees, and particularly to Mr Dzierzanowski who described him as a friend. Ms Thornton also described him as a friend, and one who helped her to pass her exams. She said, *"he is a really good guy and never deserved anything like that."*. I do not regard this as information where people were confirming what others had seen in order to create a case. They were offended by such language, upset for the former franchisee and upset for themselves about being in such an environment.

330. Ms Rusted said (at para. 33) that she remembered being shocked by the public insults of Mr Benson from Just Benson on Facebook. She said (at para. 39) that it was completely untrue that Mr Benson was a friend of the Chinese franchisee. Mr Benson was often racist about him, including publicly on Facebook and the Chinese franchisee hated him for it. She said that she had spoken directly with the Chinese franchisee and she knew the truth from him.

331. Ms Rusted heard Mr Benson say racist comments often. Once he made a comment about Arab men having a harem. He referred to a bad smell in the car after a lesson with an Indian pupil. Ms Rusted found this particularly upsetting.

332. These comments had effects on franchisees who were not the direct object of the abuse and racism. As Mr Szatkowski put it, as a person of non-British origin, he was concerned about what names he would be called in the event that he decided to stand up to Mr Benson in the way in which the former Chinese franchisee had done. He also said that although he did not know the franchisees who had left and whom Mr Benson said that he would ruin financially, he thought that it was unbearable being chained by a long contract to someone like him. He came to the conclusion that he did not want to have anything to do with this person.

333. Ms Newman heard Mr Benson comment on a pupil, *"When they got out of my car it used to smell like curry. I class him as being a full on racist"* (at para 28 of her witness statement). Mr Chapman at para.22 said that on Facebook, Mr Benson had no filter: he was just disrespectful and angry. Ms Newell (para. 17) referred to a gang of people whom he described as Mr Benson's lackeys who would join in with his racist and sexist remarks.

334. Mr Benson commented to Ms Freeman about Thurrock, where she was teaching that it was *"full of Pakis and blacks"*, whereupon she told him that she was half Indian, and he raised his eyebrow and went quiet. She said that his remarks made her feel uncomfortable as did the raising of the eyebrow. She thought that this was a very racist comment and from that point she felt that Mr Benson was particularly cold towards her. Whether or not he was, this is a sign of how hurtful such remarks can be and the impact which they can have. Mr Benson denies that he said this, but I am satisfied that he did so. In the context of everything else in this case, it was in character. JBL says that the allegation is of events more than three years before termination but that does not make it untrue. If it was the only allegation, then it would not form a basis for termination, but it is a part of a course of conduct, one of which is repeated racist, sexist and homophobic remarks.

335. Even in the course of his evidence, there were unnecessary and potentially offensive references to the origin of people. Mr Benson was asked about a message to him in what appeared to be competent English by a former franchisee Javid Rahimi who wrote *"If you're in a manipulative, deceiving contract, do you not try (sic) find a solution for it? You have all these instructors in the knot John."* When it was suggested that Mr Rahimi had been referring to a financial trap, Mr Benson replied saying that the term "knot" came from an Afghan gentleman who had only been in the country for a few years. It seemed telling that Mr Benson referred to his country of origin as if what Mr Rahimi could be dismissed out of hand, whereas in fact Mr Rahimi expressed himself clearly.

336. As regards homophobic remarks, reference is made to the evidence of Mr Dean and Mr Court referred to above. The evidence of Mr Dean about homophobic remarks is accepted. There was a reference on Facebook in December 2014 by Mr Benson to a franchisee as *"lesbian butch"* and then referring to her as a *"stupid bitch"*. Mr Benson accepted that that was what he called her and he showed no sign of regret or embarrassment. Mr Tanfield (para. 26 of this witness statement) referred to a conversation in which he described an instructor as "proper fit" and said that it was a shame that she was a "Libyan", referring not to her nationality but to her sexuality. He explained that this was a joke, identifying the source of the joke and again without any regret.

337. I am satisfied that the breaches of the implied terms of good faith are made out not only where such remarks are directed to a person, but also where they are said about a person or against a group of persons, whether about an ethnic minority or about gender or about sexual orientation. I accept the evidence of the franchisees who said that they were upset and distressed about such remarks and being expected to be part of such a culture. I do not treat it as a convenient script repeated for effect to get out of inconvenient agreements.

(c) Insulting and abusing franchisees

338. Ms Freeman had had spinal surgery before she became a driving instructor. As a result, she struggled with perception of her feet. The effect of the surgery, that is being bed bound for eight weeks, and because of difficulties of exercising since, she had put on weight. On one occasion, when she was struggling to get down from the large step of the training bus, Mr Benson said to her in the presence of the other trainers that she was a bit fat and maybe she should lose some weight. This allegation is denied by Mr Benson. However, I accept that it was said. There is no reason for Ms Freeman to have made this up. It is consistent with Mr Benson's uninhibited and hurtful remarks at other people's expense. It is suggested that it might have been pre-contractual (because of an answer in cross-examination that it occurred in December 2016 or early 2017), but it is more likely than not that it was after her contract because it was in the context of a bus training day and she entered into her franchise agreement when she had not yet been trained. This allegation has a like significance to the remark about people from Thurrock as just set out above.

339. It is accepted that there was no evidence of actual violence on the part of Mr Benson. Despite his conviction for possession of a firearm and ammunition, which was sufficiently serious to pass the custody threshold, there is no evidence that he was violent. Nonetheless, his behaviour was frequently aggressive and coarse. There was a contretemps with Terry Faulkes during a training meeting. This was witnessed by Ms Summers who found it particularly traumatic in view of matters in her personal life. There was what Mr Benson accepted was a 'nasty confrontation' with Wendy Smith and Ciera Rogers with agricultural language. Ms Rusted was outside the office when Mr Benson screamed at her, a young woman of twenty-five, saying *"F*** off out of my office, you stupid cow."* It was witnessed by Ms George.

340. Ms Rusted described how Mr Benson behaved badly to or about a trainer Mr Kieran Williams, who was suffering from stress, referring to him as a 'pansy' and a 'pussy'. Mr Benson wrote *"The pussy's wife was awy (sic) at the weekend so he stayed at his mummies and she wrote to me yesterday making out it was him and saying that his anxiety is affecting him and he can't continue Tosser!"* He also wrote *"he's a mummies boy…pussy. Bringing his account and family friend to help him through his anxiety when he meets with me Friday. I hate stpid* (sic) *people that think they are clvouir* (sic) *the idiot."* There was no empathy due to his being unwell. Mr Benson acknowledged that he used not very nice language. This behaviour as contributing to an intimidatory atmosphere. This was a part of a wider pattern of conduct.

(d) Assessing the evidence regarding racism generally

341. Other franchisees took exception to racism in a more general way. Mr Hayward (para. 13) referred to Mr Benson's posts on Facebook being *"racist, sexist…absolutely horrible"*. Mr Tanfield at paras. 23-27 referred to Mr Benson making racist, homophobic, and sexist remarks, including about an instructor whom he named; he would also post misogynistic comments on Facebook. In Ms Freeman's statement at paras. 23-24, she commented about racist comments. Mr Stubbings said at para. 38: *"I simply could not remain an instructor with JBL as Mr Benson had revealed his true*

colours of being a dishonest bully, a dictator, someone who is racist, controlling, sexist, and childish... All in all, he made it intolerable for me to stay." Ms Newman (especially at paras. 28, 32) said that she was upset by his comments: she classed him as a *"full on racist"*. She said *It was embarrassing and upsetting and it made me feel uncomfortable to be in his presence, because he was also disrespectful towards women."*

342. This evidence has been challenged in cross-examination and in evidence by Mr Benson in particular and other witnesses. The challenges which have been made include the following points, which I have considered carefully. They are to the effect that (a) they are in general and unspecific terms, not evidenced by contemporaneous documents and not specifically timed, (b) they are of a piece from which it is to be inferred that during the events in question or more probably in preparation for the case they were the product of "groupthink", the incremental development of evidence. There were examples of this at paras. 9-11 of JBL's final closing submissions.

343. I broadly accept the tenor of the above evidence and reject the criticisms insofar as it is suggested that they did not take place. It may not have been accurate in every detail, but it speaks to the overall toxicity of the environment. If any of that language were less reprehensible in a bygone age, as appears to be suggested, that does not make it any more acceptable for Mr Benson to have used it. The reflections of witness after witness about how they were deeply uncomfortable about such behaviour are accepted. This was not an occasional lapse but a culture created and/or accepted by Mr Benson.

344. I prefer their evidence to that of Mr Benson for the following reasons, namely:

(1) I have seen and heard the Claimants who gave evidence, and the broad nature of their evidence stood up in cross-examination;

(2) in respect of the Chinese former franchisee, he published on Facebook an offensive racist description of him as above set out. That lack of respect to the former franchisee and to the current franchisees reflects on Mr Benson's character, and corroborates the more general accusations.

(3) I have observed the way in which Mr Benson spoke in the taped conversations. I have observed a general lack of respect for other people and how easily he loses his temper.

(4) Mr Benson admitted that he had made sexist comments on very rare occasions in a pub with a friend. That partial admission is telling. The fact that there is no documentary evidence of the alleged verbal conversations is not telling. They were verbal, and the evidence of the franchisees was that the environment was too intimidatory to take any action. When anyone stood up to Mr Benson, as did Ms Rusted in March 2020, they were made to regret it: in her case, being removed from the Facebook group.

345. The Court is invited to be *"worldly enough to recognise that in real life people do not always talk with the refinement and courtesy which tends to characterise conversations in Lincoln's Inn."* Whilst that is attractive advocacy, it does not begin to address a

culture of homophobia, misogyny and racism of the kind described by the witnesses. If it is suggested that some people of a certain age remain unreconstructed and without filters, that does not make it acceptable. Those who are in the workplace and who have close business relationships with other people of diverse backgrounds, must be expected to conform with the respect and decency expected in human interaction. I am satisfied that Mr Benson did act in such a way that would be regarded as offensive by decent people and that it was foreseeable that the Claimants and the other witnesses would be offended in the way in which they were. They did indeed find the working environment toxic.

(e) Abusive and intimidating environment

346. It is alleged that John Benson created *"an abusive and intimidating environment in which the claimants were required to work."* Mr Benson denies that this was the case by responding to the allegations, but also by referring to corporate hospitality and entertainment which he says was at odds with the picture of abuse and intimidation. Reference is made to holidays being arranged for Portugal for the office manager, members of staff and staff trainers and to a weekend away for eight people including Mr Ellis to Ghent in 2019. Mr Benson also referred to a yearly quiz night to raise money for charity, to a charity bike ride and BBQ in 2019 and to annual coach trips mainly to seaside resorts, to Christmas parties and to other company meals and other events to say thank you. Mr Benson says that these matters have been excluded from the franchisees' evidence because it does not suit their narrative.

347. Whilst this evidence is taken into account, it does not provide an answer to abuse and intimidation. The fact that in some respects he might behave in a generous way does not excuse behaviour which is insulting and abusive. There are a number of respects in which this was alleged to have taken place. It included:

(1) insulting and abusing franchisees particularly on posts on Facebook;

(2) boasting about actions against instructors and guarantors;

(3) making derogatory comments about female instructors (discussed above);

(4) publishing and uttering racist slurs (discussed above).

348. Examples of insulting and abusing franchisees on posts on Facebook in the Particulars of Claim included statements such as:

> "whomever wants to see how many times they can poke me in the chest before they get their faces split open it's one"
>
> "for coronavirus see holiday time for lazy ****ers."
>
> "Finally – an instructor with a brain cell."

349. The first of those was sent on 18 August 2018 and only to the trainers' group, and therefore only Ms Summers of the Claimants saw it, and she says that she was very upset by it. Towards the end of her time with JBL, Mr Benson posted on Facebook that *"2 guys with a baseball bat on their way to you Susanna (actually, make that 3)."* As she said in her witness statement, she does not care whether this was supposed to be a joke, it was not funny and it was uncalled for. Without saying that these were to be treated literally, they contributed to the toxic atmosphere.

350. As regards the second remark about Coronavirus which was posted on 7 May 2020, this was dismissed on behalf of JBL on the basis that it was a remark about what was going on at a post office with the suggestion that a competitor driving school (Mutlows) will not be working. That is to ignore the context in which this was written. It was in the period of lockdown when the franchisees had considerable anxiety about the loss of business. This statement in this context was, as stated in the Reply, found by franchisees to be *"crass and insulting"*.

351. As regards the third remark about the brain cell which was posted in June 2020, the only person with the brain cell, Mr Leech, responded positively, but it was insulting to the remaining franchisees. This too was at a sensitive time, in that 11 June 2020 was towards the end of a lengthy period of lockdown. It is not an answer that Mr Benson believed that these remarks were funny when they were at the expense of franchisees and were upsetting to them.

(f) Other examples of abusive and controlling conduct

352. There are many examples which emerge from the evidence. They include the following:

(1) Mr Robins' reference to passing Mr Benson's office and saying "Good morning" to him whereupon he received a letter reprimanding him for communicating without a prior appointment;

(2) the first three allegations made by Ms Rusted comprising witnessing abusive and aggressive behaviour by Mr Benson towards female staff, specifically Ciera Rodgers, suffering the same whilst receiving one-to-one tuition and when payment was demanded for training days which she was unable to attend due to illness;

(3) this aggressive approach manifested itself at training days, where according to Ms Rusted (para. 12), he acted like a bully, making people scared of him. As noted as a proven allegation of Mr Monk, Mr Benson berated him in front of other instructors at a training day about a wrongly installed roof cone, and shouted that Mr Monk should be ashamed of himself.

(4) the third allegation of Mr Stubbings, namely unreasonably chastising him about his wearing a polo shirt in terms out of all proportion to the breach of contract (if there was one);

(5) the fourth allegation of Mr Stubbings about the public humiliation of Mr Laughlin on a bus day with swear words being used;

(6) the language used to Ms Newman in the recorded interview set out in consideration of Ms Newman's evidence. This is also another example of referring to court proceedings *"some of them have lost their houses, that's how it works"* in an intimidatory manner;

(7) abusive and aggressive behaviour to Ms Newman during one-to-one tuition.

353. There are numerous instances in the evidence of sanctions for breach out of all proportion to the original breach. These have been used in an intimidatory way to procure compliance and to punish. They are instances of controlling behaviour. Examples are as follows:

(1) the communication about the three rings policy referred to Ms Summers to the effect that failing to observe it would be met with the sanction of blocking the miscreant which was intimidatory and out of all proportion to breach of a rule which was described by Ms Summers as a *"chaotic communications policy".*

(2) excluding people from Facebook due to their behaviour being disapproved of including Ms Rusted's seventh allegation thereby depriving them of an important source of information about the franchise;

(3) the threat of removal, and actual removal, from Facebook for posting prices of lessons (PC para. 10(xi))

354. There is also the evidence of the communications with Mr Tanfield of Mr Benson mentioning that his father who had just died was a guarantor. Mr Benson also instructed his lawyers to write before the funeral had even taken place.

(g) Boasting about actions against instructors and guarantors (PC para. 10(ii))

355. The evidence is that JBL has been involved in a large number of cases against former franchisees. Over a course of 30 years, it was said that there had been about 80 to 100 cases. That was said to be out of about 1400 franchisees over a period of 33 years, and therefore much less than 10% of the franchise community. There was an attempt in the course of evidence to piece together how many franchisees had terminated early, and there were many instances which were the subject of settlement agreements. That started from a list of 70 franchisees whose agreements ended prematurely. They were named in the witness statement of Ms Summers at para. 25.

356. The suggestion in the closing submissions of the Claimants that it was 100 cases in 10 years is not borne out by my note of the evidence. There were said to be 52 settlement agreements, although it is not clear whether there is any overlap between any of those and the court cases or whether the others were in the context of a dispute or the

settlement being used as protective device so that the settlement to prevent a potential dispute is effective.

357. There was not a coherent picture of which franchisees were the subject of litigation following allegations of breaches of contract. This could not be pieced together in the witness box without relevant documents. The Claimants had sought from JBL both before trial and at trial details of the claims which had been made. Such information provided was not precise, and did not identify particular claims. JBL submits that as a percentage of the total body of franchisees, there were not a lot of claims. That might have been more credible if JBL had provided information when requested with the assistance of their solicitors Holmes & Hills who had acted for years for JBL. They would have been able to piece together a more coherent and detailed picture than that provided. Without such information, the Court is not prepared to assume in favour of JBL that the number of instances of litigation or settlement agreements was 'normal'. It appeared to evidence problems such that all was not well within the franchise and conflict was a norm rather than an occasional problem. This could have been addressed in detail to show that that was not the case: it was not.

358. The material before the Court shows that Mr Benson did not simply exercise contractual rights on breach but used such controversies as a stick with which to beat not only the defaulting franchisee but the franchisees generally. He did so in particular by his postings on the Just Benson Facebook group and in his conversations with franchisees. The language employed was not simply informative. It was intimidatory to any franchisee who might be contemplating this path, or more worrying still, to those who were drifting into breach because of a business model which they could not sustain.

359. The Claimants say that such a large number of actions is telling about the business model and about the attitude of Mr Benson. What does emerge from the evidence is that the allegation that Mr Benson boasted of having sued former instructors and taking their homes or their guarantors homes is well made out.

360. Examples of posts on the Just Benson Facebook account about what franchisees could expect to happen to them are as follows:

(a) *"Calvin Bennett and Matt Talbot ... will be subject to high value claims and their terminations will be financially disastrous to them. Good (riddance) to bad rubbish."* (19 December 2018). There was a smiley which followed, which Mr Benson claimed was inserted so as to say the message "nicely." When it was put to Mr Benson that he was gloating, he denied this, and said that he was simply passing on information.

(b) "In 2018 several franchisees also illegally terminated and are now subject to claims that will financially ruin them."

(c) *"Janine worked here for about 5 years, entered into 5 agreements the last for 10 years then terminated her agreement ranting on about (at trial) "tricked into signing" ... The company won. She then went bankrupt and is now having her home that she "gave" to her son repossessed ... "* (10 May 2019)

(d) *" .. James Kehoe ... got stroppy and left and we issued proceedings for our loss. In February 2019 at a pre-trial meeting (mediation) he negotiated a return, paid*

> *our £19,500 legal costs to date and entered into an 8-year agreement ...yesterday we got rid of him . ... Good riddance to bad rubbish."* (29 August 2019).

361. A close reading of the 19 pages of guidance provided to franchisees shows that Mr Benson was up front about his modus operandi. He said the following:

> "Fundamental Breaches/Illegal Termination of the Franchise Agreements and Claims. About two or three times each year sometimes more we have instructors that terminate their agreement earlier than permitted. This happens for various reasons." [He then referred to people leaving after having been provided with a tuition vehicle and having had work and weeks of free fees and then leaving when having to pay their first fee]. "It's not a bad figure to lose less than probably 4% of the total instructors franchised to the company each year but in my personal and professional opinion I consider it appalling behaviours; disrespectful and selfish with every other franchisee honouring their responsibilities and "paving their way".

362. This appetite for litigation and parading the litigation and the consequences of the litigation *('financially disastrous', 'financially ruin', 'bankrupt',* home *'repossessed'*). References to *"good riddance to bad rubbish"* have the inevitable effect of frightening existing franchisees, particularly those who are having difficulties paying the franchise fees and making ends meet. There was at lowest an absence of sensitivity or compassion for the existing franchisees, but it was more deep-rooted than that: it was to scare them into compliance and to let them know that any action would be vigorously pursued to the end.

363. Conduct after the termination of the franchise agreements cannot be characterised as a breach of contract because the good faith obligations came to an end on termination. However, there should be noted Mr Benson's reaction to posting on Facebook by Mr Chapman saying that a group was terminating because they found *"intolerable the abusive intimidating and discriminatory culture created by Mr Benson"*. The posting also referred to finding it intolerable *"pretending that we are genuinely in business on our own account when we are almost certainly not."* Whilst Mr Benson was entitled to respond in terms, and the duty of good faith had ceased vis-à-vis the terminated franchisees, Mr Benson posted the following on 14 December 2020:

> "Although they may have found a way to lie out of their agreements they have not left behind or sneaked out of damages claims. A lot of people and/or their guarantors are going to have a deservingly and horrible and life changing 2021/2022 onwards….Watch this space."

364. This is relevant because it is this kind of language that was used to the Claimants whilst they were franchisees. It helps corroborate for example Ms Rusted's witness statement at para. 38 that Mr Benson used to brag that he had taken ex-instructors' houses. He used to say all the time that he always won or *"Oh. Another house"*. He used to mention it at training sessions on the bus, saying to anyone who spoke up *"you carry on mate because I'll see you in court."* The evidence of Mr Benson is that he would look to identify whether the franchisee had a property of their own or could provide a guarantor with a property. Likewise, the evidence of Ms Newell is credible and is accepted that whilst waiting in the office she heard Mr Benson saying that he earned more money by taking people to court then out of the driving school.

365. The defence of JBL is that JBL did what it could to discourage franchisees including bringing proceedings against them when they sought unlawfully to terminate their agreements. Part of that was to make it known to franchisees who might otherwise be tempted to breach their agreements. That was not boasting of success, but warning of the consequences of breach.

366. Even if that were the case, which is doubtful, the postings went far beyond what was necessary. Their tone and message were intimidatory and were designed to be *in terrorem*, that is to instil fear of the consequences of breach to the franchisees. It is one thing to say from time to time that JBL will enforce its legal rights in the courts. It is quite another to use the aggressive and intimidatory language used, celebrating the impending financial ruin and even the possession of houses. They had a significant detrimental impact on the franchisees, which is to be seen not just for itself but in the context of other intimidatory behaviour.

367. An example of this is in the case of Ms Freeman. She said (para. 25 of her witness statement) that she had a conversation with Mr Benson about a late franchise fee payment, which had since been paid. During the meeting, Mr Benson referred to other instructors who had fallen behind on franchise payments, saying that he had taken them to court for breach of their contracts and had taken their homes or the homes of their guarantors. He said that people should feel scared of him and then made a gun shape with his fingers she said that she found this extremely frightening and left the meeting feeling really fearful and threatened by him. She cried most of the drive home. Mr Benson denies that this occurred and he said of her evidence that it was *"rubbish, absolute rubbish."* Despite the strength of his denial, there is no reason to disbelieve Ms Freeman. This was an experience which would have been impactful. Although it was not specific in time and although it did not form the subject of a contemporaneous document or a complaint, I accept her evidence in substance.

368. Related to this analysis is JBL's suggestion that the Claimants are a peculiar assortment of franchisees who are not representative of franchisees as a whole. On this analysis, they are to be treated as some amorphous group who were not able to cut it, from which the Court should conclude that their allegations reflect their own inadequacies rather than any breach, let alone repudiatory breach, of JBL. I do not accept JBL's suggestion, bearing in mind the following matters or any of them, namely:

    (1) they are a large cohort out of the total number of franchisees, even though not a majority;

(2) taking on JBL in the way in which they have done was a decision of huge import bearing in mind the consequences including the litigious and aggressive nature of their portrayal of JBL. The huge stress of this High Court action is not something lightly undertaken.

(3) the fact that others did not join in does not indicate that their franchise agreements were satisfactory or indeed that they were different from the position of these franchisees. It might indicate that they were not prepared to take on the risks and the stresses undertaken by these Claimants.

(4) an example is Mr Dean who did not elect to terminate at that stage, but did so at a later stage, bringing proceedings in the Employment Tribunal.

(5) the failure of JBL to provide further information relating to the numerous cases of litigation and settlement agreements identified by Ms Summers in the evidence is such that the Court is left with a big picture that there are many fractured relationships. If JBL had wished to show that these were highly unusual and unrepresentative cases, they could have provided detailed information when requested so to do. Without that information, there appear to be numerous cases of commercial disputes which appear to be telling about the model not being in good order.

(6) the matters set out herein about the business model generally seem to bear out serious underlying problems.

(7) the fact that Mr Benson has been able to drive through his cause in court cases, assuming for this purpose that that is the case, may only mean that the Court has not previously had to grapple with the big picture or that that there was an inequality of arms between the parties in the litigation.

(h) Not permitting franchisees to have their mobile numbers on their vehicles (PC para. 10(xv)

369. The specific allegation is *"JBL acted capriciously when asked for permission to advertise personal telephone numbers on their cars. Almost all such requests were refused. Permission was only granted on the basis of favouritism."*

370. There was a contractual clause about signwriting the vehicles to the specifications of JBL. The evidence is that in respect of Ms Rusted, she was allowed to display both her name and her mobile number on her vehicle. Ms Summers was allowed to display her name but not her mobile number. Other requests of Claimants were refused. This was also a specific breach alleged by Mr Hayward, Mr Monk, Mr Robins, Ms Newell and Ms Newman and it appears in other witness statements of franchisees.

371. The case of JBL is that they did not prevent the franchisee from advertising, but they had to advertise the franchise business, and in this particular respect, the reason given was that it was preferable that potential pupils would telephone central office. They would have a greater expertise in taking the call. They would be able to direct it among the franchisees. It was stated in the Defence at para. 10(xv) that JBL acceded to requests

from experienced franchisees to have their name and telephone number sign-written on their vehicle, but this is not permitted in respect of inexperienced franchisees. A reason given in evidence for not allowing franchisees to display their mobile numbers is that they might miss calls due to being involved instructing pupils. If that was a decisive reason, it would have led to JBL never acceding to such requests, but JBL's Defence is that they did accede to them: see Defence para. 10(xv). It is also contradicted by Mr Benson's evidence (at para. 26 of his witness statement) that the franchisees were encouraged to include their own telephone numbers on their promotions.

372. It is apparent from the welter of evidence that franchisees regarded it as of importance to be able to advertise themselves by having their numbers on their vehicles. As the instructor went around their own locality in their own vehicle, they would be expected to be seen and to strike up conversations and for word of mouth to get around that they were a good instructor. There was nothing more tangible than having their personal number on the vehicle. When inquiries followed, the business would go to them if they had availability, failing which they would pass it on to head office. On the other hand, the fact that the only number was almost invariably that of head office meant that it depended on head office to whom the business would be referred.

373. In my judgment, there was an implied discretion on the part of JBLas to what they included in the signwriting on each car and as to whether to allow a franchisee to have their number on the vehicles. JBL's case is that they did permit franchisees to display their mobile numbers on their vehicles, They claim that they did not allow inexperienced franchisees to do this because they would be less competent than those who worked in the office.

374. The evidence before the Court is that the Claimants save for Ms Rusted did not display their mobile number, and only Ms Summers was able to display her name on her vehicle. The fact that the other Claimants did not have this available, and the absence of specific evidence about what was permitted to other franchisees, make the Court prefer the evidence that few franchisees were given the permission to display their own mobile number. I am satisfied on the facts of this case and in the context of the evidence as a whole that the discretion was exercised capriciously. Whilst in the round, the experience of head office may count, the weight of the evidence is to the effect that this was a part of controlling the franchisee and emasculating their ability to generate their own business. It rendered the franchisee dependent on head office for distributing the work. At its worst, save for a favoured few, it gave head office the ability to prefer instructors who were in favour and to withhold business from those who were not. There is evidence that Mr Benson gave an instruction that those who had upset him should be withheld work.

375. If there was a real concern about how franchisees would deal with inquiries, then they could be taught by head office. If they were not taught, that is an indicator that it was not a genuine concern and/or the real concern was, subject to a small number of exceptions, to retain control for JBL.

376. In circumstances where so many franchisees were struggling to make ends meet and to pay the franchise fees, the ability to advertise their personal numbers in this way was vital, and yet almost all franchisees were deprived of it. This feature was a part of a business method which rendered JBL powerful and it deprived or affected the

franchisee of the ability to create new business for themselves. This breach is to be seen in the context of this case, and is not of general application to other cases.

377. In my judgment, this refusal was a breach of each of the implied terms, that is to say that it substantially deprived Claimants from obtaining benefits granted to them or undermined the terms of the bargain and a discretion was exercised capriciously or arbitrarily. Further, by refusing the request to have their own numbers, JBL was in breach of the implied term as to trust and confidence. In effect, JBL was saying that it did not trust the franchisees to sell without reasonable cause. That was an approach which undermined trust and confidence.

378. Related to this breach of contract, I am satisfied that the refusal to allow Ms George and any other franchisees complaining of not being to advertise locally was a breach of contract for the reasons identified in the discussion about her first allegation.

(i) Breaches relating to COVID

379. There are two breaches of contract alleged in respect of the COVID pandemic. The first is the insistence by Mr Benson that all franchise fees be paid even though the Claimants were unable to trade whilst JBL took the benefit of government support: see Particulars of Claim para. 10(xvi). The second is a unilateral increase in the term of the franchise agreements: see Particulars of Claim para. 10 (xvii).

(j) The insistence on the payment of the franchise fees

380. In the weeks prior to Covid, the national lockdown being announced on 23 March 2020, franchisees were finding that their ability to teach and income had already been affected seriously due to public concern about Coronavirus and pupils having to cancel due to illness. This was affecting already their ability to pay franchise fees It was therefore incumbent on a franchisor to be sensitive, collaborative and consultative.

381. On 17 March 2020, Mr Benson responded on Just Benson to concerns among the franchisees about Coronavirus. It is instructive to set out his communication in full:

> "A lot of you are asking the office staff so here's my answer.
>
> The question is (mainly) "what is John doing about Corona Virus." It's a silly question guys; I mean, what am I supposed to do?
>
> The virus is one that we must all deal with one way or the other.
>
> Unfortunately, it seems largely media fuelled in as far as they have this supersedes any previous or are making it both worse or/and sound more severe than it really is. I CAN'T CHANGE THAT!

> The main worry seems to be if pupils cancel lessons and, "how am I going to pay my franchise fees". Well… the weekly fees must still be paid. The company expenses won't disappear because of the virus. We still have to pay wages and the running of this office and promotion/marketing etc.
>
> You all should have sickness insurance or you could all use one or both of your franchise fee weeks. Or you could arrange a period of lesser fees in exchange for a longer period. I am willing to arrange a say 12 week period of lower weekly fees if you agree to add it to the term of the agreement?"

382. Instead of trying to understand the position of the franchisees, Mr Benson was dismissive of their concerns and regarded any question about it as *"silly"*. He was only concerned about JBL's ability to pay its expenses without any or any apparent regard to the concerns of the franchisees. At a vital time to respond to these concerns, the communication of 17 March 2020 was dismissive and high-handed. It did not come in a vacuum but it was a reaction to concerns which was being expressed more and more from early March. By that time, although a week prior to national lockdown on 23 March, the national concerns were intense in that the UK was put on high risk and self-isolation was recommended for vulnerable people.

383. Mr Benson stated that "a lot" of franchisees were concerned about the impact of Coronavirus on their ability to operate the franchise. It is said on behalf of JBL that this reaction was at an early stage which was difficult for all concerned. It is to be contrasted with his reaction a week later after the first national shutdown had been imposed. Nevertheless, it had the following features, namely:

(1) it was an uncooperative, selfish and high-handed response in which the legitimate question put to him was said to be *"a silly question"* and the virus was said to be *"largely media fuelled"*;

(2) the primary concern in response was for JBL which would have to pay the company expenses;

(3) the concern for the franchisees was largely ignored with the statement that *"the weekly fees must still be paid."*

384. There was a reference to the franchisee arranging paying lesser fees in exchange for a longer period of the franchise. This would not erase fees, and it replicated locking the franchisee into greater and longer commitments. The other possibility of lesser fees was also not unconditional, but was subject to an agreement to be made.

385. In short, the concerns of the franchisees were treated dismissively. The interests of JBL were elevated above the interests of the franchisees. Any solution would be not to share the pain, but to create benefits for JBL. It was at this point that Janine Rusted, who appears to have enjoyed a particularly good business relationship with Mr Benson,

responded on Facebook. She said, *"I saw the other instructor companies, I've researched, they are all freezing the contracts because we can't work."* The response of Mr Benson was: *"Why you bringing this up on Facebook? This should be a one-to-one conversation."* Her approach was that this affected all of the franchisees. Her evidence is that from this point, Mr Benson did not engage with Ms Rusted, and his answer was said to be *"quite short, abrupt and rude."* He blocked her from *Just Benson* so that she could not see announcements for JBL or updates about company policies: see her witness statement at paras. 16-18. She says that this affected her business thereafter.

386. There was also a private exchange of messages between Ms Rusted and Mr Benson in which Ms Rusted wrote about the number of pupils who were cancelling due to illness and expressed her concerns about the inability to pay and the effect on her mental health. The responses of Mr Benson were about the effect on the business as a whole, and he appears to have little concern to the effect on Ms Rusted relative to that on the business. There came a point in time when Ms Rusted agreed to make payments, but then the next day on reflection felt that she was unable to do so.

387. This conduct was of importance not only in respect of the agreement between Ms Rusted and JBL. It also was important as regards the other franchisees. It is a part of how JBL reacted generally to the pleas for help and consideration during the week prior to lockdown.

388. As noted above, Ms Rusted sought to intervene publicly and privately for herself, but Mr Benson barely engaged, and expressed primary concern for himself and JBL and limited, if any, concern for the franchisees.

389. There was also the following correspondence between Ms Summers and Mr Benson. Ms Summers wrote to Mr Benson at 21.06 on 17 March 2020 that due to Coronavirus and the government's advice, and having a high risk person in her household who is her partner with liver health complications, she would only be working on a 1-1 basis and therefore not be attending the group training situations. She referred to two trainees who were high risk themselves or in high risk households. The response on the next morning at 06.33 was that he was not accepting the loss: he was at risk too, but he was travelling to central London for a court hearing. Ms Summers maintained her position.

390. On 19 March 2020 at 09.23, Mr Benson wrote in the following terms to Ms Summers. He said that learner drivers had become more important to her than training. *"Coronavirus seems to be the latest excuse or reason."* Franchisees are relying on it, and the desire to self-isolate is not reason for him or JBL to take a loss. *"Arrears (of franchise fees and training) will not "disappear" due to illness. Coronavirus is not a product [of] me or this company. And we will not suffer financially for it."*

391. At 16.32 on the same day, Ms Summers referred to how all her family members were in isolation since all of them had members at high risk. When she was out of isolation, she would then redirect her thoughts to building the business. She found it hard to swallow being told that she put the trainees second to the learners.

392. I am satisfied both that this was a breach of the implied term as to trust and confidence in that it showed a fundamental disrespect to the franchisees generally on 17 March 2020 and to Ms Summers in the subsequent correspondence and that it was

commercially unacceptable conduct. It was a demonstration of someone who was putting himself before the franchisees at a critical time and despite the numerous concerns expressed by franchisees and government advice prior to lockdown about self-isolation and the UK being at high risk. This lack of understanding and compassion provided a context which reinforces the finding of breach as regards the purported extension of the franchise agreements.

393. This provided the context for Ms Rusted stepping forward to assist. She did not step forward lightly. She knew that Mr Benson did not take opposition or constructive criticism lightly, but she felt a responsibility to the franchisees to act at such a precarious time. She also had the confidence, misplaced as it turned out, that her hitherto good relationship with him would ensure the benefit of the franchisees. The communications which followed amounted have been summarised above I am satisfied that this amounted to a breach of the implied term of trust and confidence in the same way as the original communication of 17 March 2020. It showed that that communication was not an isolated error to be seen in a vacuum, but represented a trenchant approach of Mr Benson, elevating his interests at the expense of the franchisees.

394. It is said that this was short term and came to an end by the communication of 24 March 2020 after the inception of lockdown. It might have been different if Mr Benson had admitted that he had acted in uncompassionate way and had recognised in some way the suffering of the franchisees. He did not do that. Insofar as the communication of 24 March 2020 is said to be the answer, it is not because (a) it did not affect what occurred prior 24 March, and (b) it purported unilaterally to effect an increase in the length of the franchise agreements, which were already perceived as unduly long, uncertain in duration and oppressive. This judgment now turns to consider that.

(k) Increase in the length of the franchise agreements

395. One of the allegations of breach of contract in the particulars of claim is of a unilateral increase in the terms of the franchise agreements: see para. 10(xvii).

396. On 24 March 2020, the day following the announcement of lockdown, Mr Benson wrote as follows:

> "Due to the government "lock-down" and instructors unable to work (save for teaching key workers and some motorcycle courses) from Monday 30 March 2020 all franchise agreements will be suspended (so that no weekly franchise fee will be payable) for a period of six weeks. This will be reviewed before the 6 week period expires…
>
> This will be a period of "Frozen-Franchise" in as far as whatever fee you maybe currently paying or period of your franchise that you are currently at will remain and recommends once we can return to some form of normality again.

> So as to avoid any reason for doubt, the franchise agreements are suspended for an initial period of six weeks. The suspension will start on 30th March 2020. The period in which the agreement is suspended (currently six weeks but under review) will be added to the end of your minimum term (i.e. the Agreement will last six weeks longer than it would have if there was no suspension).
>
> …
>
> "This supersedes any previous/recent offer made. We will consider any holiday/franchise free periods as it falls due."

397. On 15 June 2020, Mr Benson gave a "Corona Virus" update in the following terms:

> "Due to the governmental lockdown and driving instructors unable to work (save for teaching key workers) from Monday 30th March 2020 we temporarily suspended all franchise agreements (and no weekly franchise fee was payable) for a period of 6 weeks. That period ended Monday 4th May 2020. We then extended it by a further 4 weeks commencing 11th May 2020. That 4 weeks expired 1st June 2020. More recently we [extended] it by two further weeks that expires today 15th June 2020.
>
> This company was given notice that the DVSA will permit driving instructors returning to work Monday 15th June 2020 however, this was changed and the restart date is now currently set for 22nd June 2020.
>
> Therefore, and again, this company is further extending the temporary period by a further two weeks.
>
> …
>
> So as to avoid any reason for doubt, the franchise agreements are suspended for the period of two weeks. The suspension will start on 22nd June 2020. The period in which the agreement is suspended (currently 2 weeks but under review) will be added at the end of your minimum term (i.e.the agreement will last 2 weeks longer than it would have, if there was no suspension) (plus the first period of 6 weeks and a period of 4 weeks plus the earlier period of 2 weeks)."

398. There were many communications from franchisees expressing their concerns. In a letter from Aquabridge Law on behalf of the first nine Claimants dated 5 October 2020,

they stated among other things: *"(xiv) your client has purported to unilaterally extend the term of our clients' respective contractual agreements without their consent."*

399. The Defence at para. 10(xvii) is that a typical agreement provided the duration of the agreement comprising three franchise periods of which the second period included *"any period during which the agreement is suspended"*. None of the Claimants or any other franchisees objected to the suspension and any franchisee who objected and preferred to continue paying franchise fees would have been free to do so. Reliance was also placed on a message of Ms Rusted dated 20 March 2020 asking if it would be possible to freeze payments and then add them to the end of her agreement. It is not clear that this meant extending the agreement period: without more, it was not a contractual offer, but in context, this was desperate talk by a desperate franchisee at a desperate time.

400. JBL considered the allegation about a unilateral increase of terms in written closing submissions at paras. 87 - 96. It accepts that there was no express power to suspend the franchise agreements, and the only reference to suspension was the automatic suspension which follows repeated failure of the Part 2 or Part 3 tests. The references to suspension in the typical clause 1(c)(2) must be a reference to this automatic suspension. It is not contended that there was an implied right to suspend.

401. By recognising the fact that the written franchise agreements did not contain a unilateral power to suspend, JBL has recognised that its pleaded case at para 10 (xvii) of the Amended Defence insofar as it relied on the duration of the franchise by reference to a period during which the agreement was suspended did not assist JBL. The Amended Defence also referred to the absence of objection to the suspension and that franchisees would have been free to continue paying franchise fees. The Amended Defence did not plead expressly that the communication of 24 March 2020 was an offer and that the subsequent conduct of the franchisees amounted to an acceptance.

402. Whilst it has been recognised that the communication of 24 March 2020 was *"expressed in peremptory terms"*, it has been submitted on behalf of JBL that this and subsequent similar communications *"should properly be analysed as offers"*. The offer of 24 March 2020 was open to be accepted or rejected, and they were accepted by thanking JBL or ceasing payments or both. It is recognised that *"it might have been better"* if JBL had used the language of contractual variation.

403. In any event, it was submitted that even if there was no variation, it would not have been a breach of contract but an attempt by a contracting party to alter terms in a way that it was not entitled to do. That action would simply be contractually ineffective and a nullity.

404. The Reply at para 12 did not deal with the new case which is now advanced about an offer of variation and an acceptance. It interpreted the reduction of the fee as being an agreement on the part of the franchise or to accept a reduced fee under clause 7(c) of the Franchise Agreement. Such an agreement or concession did not suspend the terms of the franchise agreements and did not entitle JBL to extend the termination date: see the Reply at para. 13.

405. The new analysis of the pleaded variation is a surprising one. It would be expected that a variation of this kind, potentially extending the duration of the agreements by months, would be the subject of a formal agreement. It would not take place by way of that

which has accurately been described as 'peremptory' correspondence. What occurred was sought to be imposed on the franchisees in a peremptory manner. There was no intention to offer a variation and find out if it would be accepted by the franchisees. Where a guarantor is involved, as is the case in respect of many of the franchise agreements, one would expect that the variation would be offered to the guarantor as well as to the franchisee.

406. Another indication that a variation of the franchise agreement was not intended is the contrast between the communication of 24 March 2020 and the communication to franchisees dated 28 January 2020, only a few weeks earlier. The 28 January communication to the franchisees was entitled *"variation to the franchise agreement*," It offered to remove the requirement that driving tuition was only at such fees as were prescribed by the franchisor. It stated expressly that a variation was being proposed. It informed the franchisee what it had to do in the event that they did not accept it.

407. Likewise, a few days later, on 7 April 2020, offers were made to various employees of JBL to vary their contracts so as to become eligible for furlough leave. The precise nature of the variations was specified, and the employees concerned were asked to sign and return the letter to confirm agreement to the variation.

408. JBL now submits that the difference in March 2020 was that an urgent response was required to the franchisees' communications regarding franchise fees during COVID. That does not explain why the e-mail went beyond not taking fees and requiring the franchisee to agree to an extension of the terms of the existing franchise agreements.

409. JBL also makes the point that it could have done nothing and insisted on the continuation of franchise fees without any requirement that the franchise agreement be extended. In short, JBL was doing a favour to franchisees, and in effect there was nothing wrong with the quid pro quo of an extension. This ignores the following, namely:

(a) as stated to JBL at the time of the refusal to address the matter in the week prior to Covid, other driving schools were not insisting on payment of franchise fees;

(b) once the lockdown occurred, furlough became available and applications were made by JBL for between one and three employees: it follows that the overheads of JBL would have been significantly reduced such that insisting on franchise fees would have been unduly harsh;

(c) the unconditional removal of franchise fees during lockdown would have been a reasonable response to the unprecedented crisis, especially bearing in mind that the franchisees were on such long-term contracts. It would also reflect that during lockdown there was not just a cessation of the driving instruction on the part of each franchisee but a concomitant cessation of support services including referrals by JBL to instructors;

(d) if an extension of the agreements had been sought for the same period as the period of the lockdown, that could have been sought expressly and those franchisees, if any, who would have wished the same could have considered it as an unconditional offer.

410. I have reached the following conclusions:

(1) it is right to concede that there was no express power to suspend the franchise agreements and thereby to extend the franchise agreements in the events which occurred. the peremptory language contained in the email of 24 March 2020 and subsequent communications were not offers of a variation. There was not the language of an offer of a variation, seeking the agreement or otherwise of the franchisee. It was the language of informing the franchisee about something that had happened over which they had no control. The franchisee was not told that they could accept or reject;

(2) if and insofar as franchisees expressed approval or accepted the benefit of not having to pay during the weeks of suspension, they were not expressing approval or acceptance of an extension of the franchise agreements. The informal thumbs up or other expression of approval was in context informal thanks for the decision of JBL not to charge the franchise fee for the time when the franchisee could not work due to COVID;

(3) it is unrealistic to expect that a franchisee should have an obligation either to accept the extension of the franchise agreement or to call out that it was a unilateral variation which they do not accept;

(4) the notion that the franchisee accepted the position by not paying the franchise fees during the lockdown is rejected. The conduct relied upon would have to be clear and unambiguous. It was not: it was an omission which was consistent with a belief that JBL was agreeing not to charge the franchise during lockdown (a power described in legal terms on their behalf as being pursuant to a power under para. 7(c) of the agreement). In the context of the national emergency, this did not seem to be an unlikely scenario, but a logical unconditional response.

(5) there was a benefit to JBL to take such a course in that it was important to keep the franchisees on side. If JBL insisted that they paid during COVID, he might have not been able to recover anything and he might have lost them as franchisees. There may also have been tested whether COVID had frustrated the agreement or whether there was some other argument arising out of whether the fees were not in the circumstances payable.

411. JBL has submitted that if there was no variation, then there was no breach of contract because the purported variation was ineffective and therefore a nullity. It may have been ineffective, but in my judgment, it was a breach of the duty of good faith to purport to alter the terms of the agreement by extending the same in a way that was not permitted by the agreement. This was not a minor matter, but it purported to add months to the contract. It is reflected in the Counterclaim where JBL purports to add thousands of pounds of revenue which would have been earned during the period of the extended contract.

412. This was not an academic matter. At a point in time when the Claimant franchisees were dissatisfied with the attitude of JBL and were vulnerable due to COVID and its

impact on them as regards their obligations under the franchise agreement, the relationship was undermined by the wrongful insistence that the agreements would have to be extended. To use the language of the implied terms which are the manifestation of the obligation of good faith, the purported unilateral variation was conduct in this context which would be regarded as commercially unacceptable by reasonable and honest people. Alternatively, JBL conducted itself, without reasonable and proper cause, in a manner likely to cause serious danger to the relationship of trust and confidence. This was not an isolated error in a letter written in haste. It was a considered email. Its substance was maintained by the communication in similar terms of 15 June 2020.

413. When the letters were written prior to termination, the complaint was made about unilateral variation, and there was no attempt to resile from the position of JBL. When proceedings were issued, the counterclaims were served seeking to counterclaim on the basis that the franchisees were responsible for an additional 14 week Coronavirus period which had a consequence of thousands of pounds per franchisee.

414. An example of the effect of the foregoing on individual franchisees is as follows. In the evidence of Ms Thornton, she said that a problem was that they did not know when the contract would finish because they were never given a date when it would finally end. It felt like the date kept on moving. She said that when the contracts were being extended even further, she could not believe it. She could not carry on.

415. Mr Ellis said that Mr Benson was very slow to offer a reduction due to the effect of COVID. When he did give an indication, he said that the last thing he wanted at that stage was be longer in a contract with JBL. That was the result of his not trusting Mr Benson.

416. The finding that this was a breach of the implied term as to trust and confidence is reinforced by the surrounding circumstances and/or the context of related breaches of the same implied term. The immediate context was the communication referred to above of 17 March 2020 quoted above and the tenor of the communications to Ms Rusted and Ms Summers. Not only were they breaches of the implied term of trust and confidence, but the unilateral increase is to be seen in that context which informs as to the character of communications of 24 March 2020 and 15 June 2020. The context informs as to the character of the breach as regards the purported extension of the franchise agreements.

417. An argument of JBL in this case is that the real problem was not Mr Benson, but Covid. A business which had operated satisfactorily for years was rendered very difficult due to Covid. The agreements did not provide release for them, but Mr Benson had been prepared to assist them voluntarily by his suspension of the agreements. Covid was a problem, but it was a problem which was not suitably addressed by JBL. At first, it was treated dismissively by the communications of 17 March 2020 and thereafter. After the inception of lockdown, it was treated opportunistically by seeking to impose on the franchisees an extension of the franchise agreements totalling more than three months. At a time when there was a need for particular sensitivity and understanding, these were in short supply as JBL sought to drive home at the expense of the franchisees another business advantage from a time of national crisis.

418. There are other features about context. JBL says that the length of the contracts to date were agreed by the franchisees, and at least as regards the original contracts, there was no cause of action pleaded of a remedy for imposing or inducing such lengthy terms. Further, JBL submits that most of the franchisees were in a good financial position, and there was nothing wrong about the JBL model that had caused or contributed to their performance under the agreements.

419. The first point is correct to the effect that there are not causes of action to rescind the original agreements. However, long contractual terms had been agreed in circumstances without any obvious reason for such long initial periods and causing a very substantial burden to franchisees absent early termination provisions. In circumstances of hard sell to enter into the agreements, almost all franchisees not being legally represented and being unsophisticated people without business experience, it might be expected that particular care would be taken that before any yet further extension was agreed and that it was very clearly signalled to the franchisees and the franchisees advised to take independent specialist advice before agreeing to the same. The case of JBL that the Court should infer that there was an offer or an acceptance on the facts of this case in the above context must fail.

420. The second point about the franchisees being well served and having sufficient business to enable them to enter into a longer agreement must also be treated with caution. Many of the franchisees who are Claimants in this case had before COVID found it difficult or not possible to service the fixed franchise fees. There had been discussions in the evidence about this. For those who have had longer franchise agreements to replace their initial agreement or agreements, this was in order to have franchise fees which they could afford. The consequence however was to be tied to JBL for even longer periods with the consequence that in the event of default, they exposed themselves to the size of counterclaims referred to above.

421. This is the context in which seeking to impose a longer term over and above the already long terms of the franchise agreements in the manner done was a breach of a duty of good faith. In the context of what had already occurred, it behoved JBL not to seek such an extension. If an extension could be sought at all, pre-conditions were (a) a very clear offer, (b) the advice that independent legal advice ought to be sought, (c) a very clear acceptance. In fact, none of those things occurred, but there is real doubt, which need not be resolved, as to whether these franchisees ought even to have been invited to have considered an extension.

XIII Alleged breaches by reference to the business model

422. Some of the franchisees gave evidence to the effect that the business model did not work in that they were bound to fail. This was for a number of reasons, namely:

(1) there were not sufficient opportunities to build up turnover to leave a living income for them after discharging the fixed franchise fees;

(2) there was a disparity between the annual increases applied to franchise fees of £18 per week and the stagnation of the tuition fees which did not increase in the period between June 2018 and January 2020 when the fees were no longer fixed;

(3) the ability of the franchisee to earn money was affected by the appointment of new franchisees said to increase the competition and to reduce the available revenue;

(4) franchisees had to attend training days and to deliver promotional material outside their areas of operation which interfered with their ability to teach;

(5) they had sometimes had to teach pupils outside their areas which involved travelling time for which they were not paid the expenses and for which time they were not earning revenue.

423. There is not sufficient evidence for this to give rise to a breach of a contractual term of good faith. The terms of the agreement provide for annual increases in the franchise fees: some were £18 per week, and some were £9 per week. There was no provision about exclusivity and so a franchisee did not have a right to a territory. If the market was saturated, there was no evidence to prove that this was the case other than the assertions of franchisees. There were provisions of the franchise agreement requiring leafleting and the like. There was no guaranteed turnover or guaranteed income.

424. Despite the above, there are serious concerns about the business model which is based on the experience of these Claimants struggling to make ends meet, and having to endure the lack of sympathy to their plight. The Claimants were far from alone as is evidenced by the number of defaulting franchisees and by the large number of people who were either sued or entered into settlement agreements. The precise number has not been shown, but if it were a small number, JBL had immediate access to the information, and they could have demonstrated this. The suggestion that everyone else must have succeeded is not a sensible inference since it has not been demonstrated and the financial and emotional dangers of taking on JBL were considerable.

425. There was hard-sell to get in new franchisees without sufficient concern as to whether or not the franchisees had the ability to succeed. If they did not succeed, JBL appeared to show mercy of a kind, but this involved tying the franchisees into very long-term contracts. Whilst this might have provided temporary respite, it locked the franchisees to JBL for many years and in many cases has been the source of the counterclaims of very large sums. Mr Benson said that they did not have to enter into longer terms, whereas the franchisees said that they did so because there was nowhere else to go to avoid immediate failure. If they did not succeed, there was factored in to the model that there would be a liability for lost profits and the ability to go after the property of the franchisee or of their guarantor. All of the above provided the context in which the seriousness of the established breaches of contract have to be assessed.

(a) Setting prices for lessons

426. Both before and after the foregoing, there were communications regarding prices for the lessons. The franchise agreements provided a term in Annex 2 to the Particulars of Claim at clause 5(g) that *"you will charge for driving tuition only such fees as are*

prescribed by the Franchisor". Many franchisees believed that the amounts prescribed by the Franchisor were beneath the market rate or lower than they could expect to charge if allowed to fix their own price. This was supported by the evidence of witnesses who believed that they were therefore not getting as much money as they would have earned if they had chosen the price. That mattered particularly in circumstances where they need to increase earnings in order to pay what they regarded as heavy fixed franchise fees and then to have money left over to afford the essentials of maintaining themselves. The pleaded case at para 10(vi) of the Particulars of Claim is that the prices quoted 2 pupils by JBL *"remained fixed at £25 from June 2018 regardless of inflation, increases in the cost of petrol and annual increases in the franchise fees payable by the claimants to JBL. The consequence was that the claimants businesses became less profitable with each passing year."*

427. There is reason to be critical of the lack of specificity of some of this evidence. The evidence as to what other driving schools were charging was anecdotal rather than supported by solid evidence.

428. In the course of closing submissions, the Court questioned the lawfulness of Clause 5g, whereby the franchisee had to fix its prices as set by the franchisor. This was not a point that has been relied upon either in the pleadings or in evidence or in argument. Since it potentially affected the lawfulness of the contract, it was raised by the Court. The parties were given permission to serve further written argument in this regard. The JBL consulted with a competition law specialist, Mr Adam Aldred whose opinion, dated 15 April 2025 was an appendix to further submissions of Counsel dated 17 April 2025. Further, the Claimants have also taken advice from counsel who had a limited previous involvement in the case, namely Mr Callum Reid-Hutchings dated 22 April 2025.

429. The following is apparent from this further advice, namely:

(1) it is potentially unlawful for there to be a requirement that the franchisor will fix the price to be charged by the franchisee;

(2) whether the price fixing was unlawful might require evidence about the difference between what has actually happened and what would have happened without the price fixing;

(3) assuming that it was unlawful, there is a question over whether the clause can be severed from the franchise agreement, which may involve consideration of whether the contract can stand without the operation of Clause 5g.

430. From the documents provided, I have reached the following conclusions:

(1) the question whether the price fixing is unlawful cannot be decided definitively at this stage and without consideration of whether evidence would be required

(2) there is a high probability that the clause can be severed without fundamentally affecting the remainder of the agreement.

431. In these circumstances the case must be determined as if there was no issue of unlawfulness. It may be said that if there had not been such a clause that the franchisees would have obtained higher prices, but there is no evidence to make out such a case. The only case which is before the Court is that until January 2020, when the prices were fixed, JBL failed to adjust the prices.

432. There are specific alleged breaches in the Particulars of Claim which now arise for consideration. First, it is said that the prices were set too low, failing to take into account the expenses incurred by the Claimants, when travelling to and from a pupil's home: see Particulars of Claim para. 10(5) . Further it is said that the prices quoted remained fixed from June 2018 without regard to inflation and increasing franchise fees, affecting the profitability of the Claimants' businesses.

433. The position of the franchisees in making these allegations is completely understandable. This is because of the difficulty of the business model in which JBL had so much control and which rendered the Claimants so vulnerable. That said, if price fixing was not in the contract or was lawful, there is nothing to indicate that the position of the franchisees would be significantly better. There is no evidence beyond the most generalised anecdotal evidence to the effect that the turnover of franchisees would have been greater. Nor is there evidence to show that if JBL had increased the fees that the franchisees would have done better. It is always a balance between increasing the fees to increase turnover and raising fees with a consequence that pupils go elsewhere. It appears to have been a very competitive market. The Court does not have the evidential material to make a judgment in this regard.

434. Whilst the Court has sympathy for the submissions that:

(a) the prices ought to have reflected the expenses incurred by the driving instructor;

(b) the prices ought to have gone up after June 2018 and well before 2020:

there is not sufficient evidence to make a finding of breach in this regard.

435. There was evidence that increases of prices took place on 29 September 2020 and much later there were much larger increases in the prices. That does not prove or indicate that there was necessarily a breach of contract at the relevant time.

436. As regards the requirement that the Claimants could not publish the cost of their services under threat of sanctions, I accept that that was a requirement which was arbitrary or capricious or unreasonable in a *Wednesbury* sense. The reason given by JBL for requiring that the prices should not be communicated was in order that an interested potential pupil should telephone Head Office. That would provoke a conversation in which an experienced receptionist might be able to persuade a prospective pupil to make a booking and not to be put off by the price. That theory has to be balanced against the effect of the policy which is to prevent the franchisee from being able to have a meaningful communication with the potential pupil, so as to be able to advertise for themselves. Any conversation would quickly come to an end if

upon being asked the price, the franchisee would have to refer the person making the enquiry to Head Office.

437. It is apparent from the communications at paras. 10(9), 10 (10), and 10(11) of the POC that this was no casual requirement. These paragraphs read as follows:

(1) on 29 September 2019, Mr Benson informed instructors that the new fixed rates quoted by JBL to pupils would increase from £25 to £26 for manual cars and from £27 to £28 for automatic cars.

(2) on 30 September 2019, Mr Benson said "*LAST TIME I SAY THIS next time I will remove the instructors from our Facebook promotions. DO NOT MENTION PRICES!...LISTEN TO ME… do not mention what we charge, last time I tell you"*

(3) on 2 October 2019, Mr Benson wrote: *"HOW MANY MORE TIMES? If you put prices on your posts... Pupils will not phone you. Last last warning"*

(4) on 4 October 2019 Mr Benson wrote on Facebook *"there's the first Benson instructor removed and blocked from the Benson Facebook groups for posting our prices."*

438. The prohibition about publication of the prices of lessons was one that carried with it a sanction of removal from Facebook promotions, and such removal did occur. I am satisfied that just as there was no reasonable basis for imposing such a requirement, and that the sanction was capricious and arbitrary and/or in breach of the implied terms of good faith.

439. The sanction was disproportionate even if there was a reasonable basis for the requirement. The ability to communicate on Facebook was of importance for franchisees to be kept up to date about the franchise. JBL's case to each of the Claimants was that one of the features of being a franchisee was to have access to *"a network providing professional and social support."* A part of that network was the Facebook pages and removal of that was to remove some of that support.

440. The reasoning here is of the same or a similar kind to the refusal to permit franchisees to display their telephone numbers on their vehicles. The effect of withholding the permission was to prevent in a major respect the franchisee, supposed to be running a business of their own, from having the ability to market themselves in a fundamental way. So too was the prohibition about publishing the cost of the lessons. Without that, any marketing would come to an abrupt end.

441. I therefore conclude that this prohibition and the enforcement of the same by sanctions comprised an arbitrary and/or capricious restriction. The ostensible purpose was so that negotiation would take place from head office. If that was a purpose at all, it was overshadowed by the purpose or effect of the same of restricting the franchisees' ability to market themselves. In my judgment, that amounted to a breach of the implied terms about not exercising their discretion to permit the franchisee to market themselves in these ways and/or it was a breach of the other implied terms including undermining the

terms of the bargain and/or a breach as to trust and confidence and/or it was conduct which was commercially unacceptable by reasonable and honest people.

442. The result of the clamour for change was that in January 2020, JBL did allow franchisees to fix the prices of their lessons. The case of JBL is that any wrong in respect of fixing prices was addressed and corrected months prior to the termination of the franchise agreements. It is therefore said to be irrelevant. However, the Particulars of Claim also allege that within less than 2 months of the removal of the fixed prices, on 19 March 2020 Mr Benson publicly criticised an instructor for increasing his lesson fee to £26.50 leading to his losing his pupil who asked for a different instructor, saying that he had lost £750 "how stupid". This substantially undermined the change in January 2020. Further, in the context of a relatively small network, it would have been a humiliation to one franchisee in particular, and although not named, it seems inevitable to have induced speculation as to who was the object of the ire of Mr Benson. The language was typically disrespectful and undermining of the confidence of the franchisee.

443. The above allegations have been proved. It remains to consider other allegations which have been proved, but where the fact that the allegations were understandable in the light of the way in which the franchisees were treated.

(b) Recruiting increasing numbers of instructors: PC para. 10(xii)

444. The only instance in the evidence where this was alleged was in respect of Haverhill. This was referred to in respect of the first of the allegations of Mr Stubbings for the reasons there set out. Mr Benson was determined to increase the numbers in Haverhill to prevent another driving school from coming into Haverhill. There was a meeting with franchisees, but this was more to tell them what was going to happen rather than to listen their concerns. In the context of a network where there were concerns as to the viability of their work for many of the franchisees, it was insensitive without necessarily amounting to a proved breach of contract.

(c) Causing franchisees to incur expenses outside their area (PC paras. 10(xiii), 10(xiv))

445. The franchise agreements contained a provision that the franchisee must make efforts to promote their business. Promotion may include leaflet delivery of 10,000 leaflets per annum as a minimum requirement per franchisees to deliver, shop or similar site advertising, boot sale and all market stall promotion days and similar. The agreement did not refer to promotion outside the area of the franchisee. Nevertheless, franchisees were expected to attend promotion events not limited to within their area. JBL's case is that in the main JBL franchisees were required to attend promotional events which were local to them. Leaflets delivered by franchisees were in the Claimants' interests. Upon request, JBL prepared personalised leaflets and posters bearing a franchisee's name. A complaint was that there was no space on the leaflets to advertise their own contact details and the type of paper with such that it would cause any ink applied to them to rub off.

446. The impression from the evidence was that from time to time there were demands to attend promotion events some way from the locality of the franchisee, and the franchisees were too scared to complain for fear of offending Mr Benson. The real problem for the franchisees was that they found it difficult to make ends meet due to the criticisms of the model referred to above. Thus, any time spent in monthly leaflet days seemed at the expense of teaching. These concerns were understandable in the context of the concerns about the viability of the business, but I have not found proved the allegations of specific breaches of contract arising out of these activities.

(d) The taxation allegations

447. There are several allegations made by claimants to the effect that:

(a) JBL through Mr Benson was conducting its affairs to evade tax;

(b) JBL gave advice to franchisees as to how they should evade tax.

448. It is not necessary to identify each and every allegation in the witness statements. It suffices to provide a broad summary. The allegations include the following:

(1) Mr Benson had a fixation about accumulating cash. This was particularly demonstrated by his desire to collect £50 notes, which was very frequently mentioned to trainers and instructors. He often spoke about how he liked cash and how cash was king.

(2) Mr Benson was proud of the fact that he had got a good deal in relation to the purchase of a car by paying part through bank transfer and part by cash. He believed that he had thereby saved a substantial sum of money on the transaction.

(3) Mr Benson told franchisees how important it was to have a good accountant which would lead to them having to pay little or no tax. Several franchisees allege that he told them to keep two sets of books, namely one for the "taxman" and one for cash receipts not declared.

449. In respect of the £50 notes, inevitably it led to suspicion that Mr Benson was hoarding cash to keep it away from the tax authorities. That is a not unreasonable suspicion because that is a usual reason for wanting to have cash whether such money was to be stored or spent. Mr Benson had an explanation to the effect that somebody had once advised him to convert any cash which he had into £50 notes. It was recommended as a way to make sure that he was not spending all his receipts at once. There was also a pride about the tangible demonstration that his cash flow was good.

450. It was also said that people paid for the training sessions on the bus in cash. This led to a suspicion that payment was in cash and without receipts because it was not intended

to be declared to HMRC. JBL's case was that this was a convenient way of collecting the relatively small sums of money, and it was up to recipients to declare such money.

451. In respect of the purchase of the car in part for cash, Mr Benson says that he was declaring his purchase through his books of account. He received an invoice from the seller which was for the full amount including the cash. He regarded the question of the accounting for cash received as an issue solely for the seller. There may have been other reasons why the seller wanted cash and was prepared to provide a discount in order to receive cash, but this was not his concern. He simply wanted to obtain the best possible price, and he did so.

452. In respect of the accountant, Mr Benson accepts that he advised franchisees to have a good accountant and that good accountants can save taxpayers considerable amounts of tax. That was not unlawful in that there is a difference between tax avoidance and tax evasion. To pay the least tax lawfully due was legitimate tax avoidance. There is an issue of fact as to whether Mr Benson did tell franchisees to keep two books of accounts. Mr Benson vehemently denies it.

453. In considering such evidence, the Court should consider the matter in line with the guidance of the House of Lords in *In re H (Minors)(Sexual Abuse: Standard of Proof)* [1996] AC 563, 586D-H per Lord Nicholls and in Re B (Children) [2008] UKHL 35 per Lord Hoffmann at paras. 13 and 15 to the effect that the more serious the allegation (e.g. fraud), the stronger the evidence required to prove that it more probably occurred, albeit that the burden of proof is the civil standard of proof.

454. In considering whether the franchisees were advised to evade tax, it is easy to understand how the allegations came to be made. Mr Benson's emphasis on cash being king, pride of having £50 notes, boasting how he obtained a discount for cash on the purchase of a vehicle only incited suspicion about tax evasion or encouraging it. Despite this, there is no hard evidence to prove that Mr Benson or JBL was involved in tax evasion. It would seem unlikely that JBL would pay its taxes whilst at the same time encouraging the franchisees to evade their taxes. No franchisee said that they evaded tax on the advice of Mr Benson.

455. Although I do not conclude that the allegations about a second set of books have been made up, I am not satisfied that this serious allegation is made out to the standard of the balance of probabilities. It seems more likely than not that in connecting the advice to pay as little tax as possible by using a good accountant and in reflecting upon the repeated emphasis by Mr Benson on cash that the franchisees may have come to a misunderstanding about how far the advice of Mr Benson went. An example of the potential for misunderstanding is the language of Mr Dzierzanowski that Mr Benson is alleged to have said that *"when you are keeping "50s"* and *"the readies"* or something like that, mentioning about as a *"self-employed person you are taking cash and then the accountant will help."* The term "readies" could have a connotation of tax evasion, but it does not always have that connotation, and could mean accessible money. In the context of an accountant helping, it may be less likely to mean to evade tax.

456. If there has been misunderstanding, it has been contributed to by the emphasis on and prominence of cash in the culture of JBL and in the words and conduct of Mr Benson. Nonetheless, I am not satisfied that the allegations of breach of contract as regards

illegal taxation activity and/or advice are proven. In the circumstances, this part of the case against JBL is not proven.

(e) The extensions of the contracts which did take place to create longer terms

457. There has been pleaded by way of individual breaches the pressure placed on the franchisees to enter into longer contracts, but there is no plea of duress or misrepresentation such as to seek to avoid these contracts. JBL's answer to the alleged breaches of good faith in connection with the drafting of the longer agreements is that there is no implied term of good faith in English law in connection with the negotiation of a contract. There is an exception in respect of certain contracts uberrimae fidei (such as insurance) or involving fiduciaries, which has no application in this case. Even assuming that there is no proved breach of contract in pressure to extend the contracts and entering into onerous extensions, this still has an effect on the overall analysis. The extended agreements only added to the relationship between the parties being unbalanced and to the franchisees being at a substantial disadvantage or particularly vulnerable in the prevailing context. The creation or perpetuation of a business model in which franchisees frequently had difficulty in servicing the agreements and they would be provided with only temporary respite in the form of an extended agreement. This added to the existing inequality of bargaining power and to the vulnerability and hardship of the franchisees.

(f) Conclusions on breach of contract

458. In the light of the foregoing, I conclude that there were breaches as regards each of the Represented Claimants. It will therefore be necessary to go on to consider whether the breaches found were cumulatively repudiatory. If so, there is the question as to whether the Represented Claimants were entitled to treat themselves as discharged from their respective agreements. These will be the subject of the third preliminary issue.

XV The third preliminary issue: were the contracts, or any of them, lawfully discharged, and if so by whom?

459. The next questions are in respect of the various represented claimants, (i) whether JBL was in repudiatory breach, and (ii) if so, whether they were terminated lawfully by the various claimants respectively. JBL submits that it was not in repudiatory breach, and if it was, that the various claimants affirmed their respective agreements.

(a) Repudiatory breach

460. The relevant law is set out in Chitty on Contracts (35 Ed.) at 12-043 as follows:

> "The bar which must be cleared before there is an entitlement in the innocent party to terminate the contract is a "high" one. A number of expressions have been used to describe the

> circumstances that warrant termination, the most common being that the breach must "go to the root of the contract". It has also been said that the breach must "affect the very substance of the contract", or "frustrate the commercial purpose of the venture", and, at the present day, a test which is frequently applied is that stated by Diplock LJ in Hongkong Fir (Hong Kong Fir Shipping Ltd v Kisen Kaisha Limited [1962] EWCA Civ 7) in the following terms:
>
> > "Does the occurrence of the event deprive the party who has further undertakings to perform of substantially the whole benefit which it was the intention of the parties as expressed in the contract that he should obtain as the consideration for performing those undertakings?"

461. In *Valilas v Januzaj* [2014] EWCA Civ 436, Floyd LJ at [53} stated:

> "Whether a breach or threatened breach does give rise to a right to terminate involves a multi-factorial assessment involving the nature of the contract and the relationship it creates, the nature of the term, the kind and degree of the breach and the consequences of the breach for the injured party: see the passage from the majority decision of the High Court of Australia in Koompahtoo Local Aboriginal Land Council v Sanpine Pty Ltd [2007] HCA 61 (2007) 82 AJLR 345 at [54] cited by Lewison LJ in Telford Homes (Creekside) Ltd v Ampurius Nu Holdings [2013] EWCA Civ 577 at [50]."

462. The reference to ***Koompahtoo*** describes a breach as "going to the root of the contract" at [54] as:

> "… a conclusory description that takes account of the nature of the contract and the relationship it creates, the nature of the term, the kind and degree of the breach, and the consequences of the breach for the other party."

463. In the above, Lewison LJ questioned whether the deprivation must be of the "whole" or "part" of the intended contractual benefit. Lewison LJ stated at para. 48 as follows:

> "[The earlier cases] adopt as the relevant test whether the breach has deprived the injured party of 'substantially the whole benefit' of the contract; which is the same test as that applicable to frustration. This sets the bar high. Other cases adopt a view that is more favourable to the injured party. Thus in … Buckley

> LJ said: 'To constitute repudiation, the threatened breach must be such as to deprive the injured party of a substantial part of the benefit to which he is entitled under the contract'"

464. Lewison LJ added at para. 49:

> "On the face of it therefore there is a tension between the test of deprivation of 'substantially the whole benefit' (Diplock LJ) and 'a substantial part of the benefit' (Buckley LJ). In Lord Wilberforce … said: 'The difference in expression between these two last formulations does not, in my opinion, reflect a divergence of principle, but arises from and is related to the particular contract under consideration: they represent, in other words, applications to different contracts, of the common principle that, to amount to repudiation a breach must go to the root of the contract'.

465. In the same judgment, Lewison LJ also said the following:

> "44. …First, the task of the court is to look at the position as at the date of purported termination of the contract even in a case of actual rather than anticipatory breach. Second, in looking at the position at that date, the court must take into account any steps taken by the guilty party to remedy accrued breaches of contract. Third, the court must also take account of likely future events, judged by reference to objective facts as at the date of purported termination.
>
> …
>
> 51. Whatever test one adopts, it seems to me that the starting point must be to consider what benefit the injured party was intended to obtain from performance of the contract….
>
> 52. The next thing to consider is the effect of the breach on the injured party. What financial loss has it caused? How much of the intended benefit under the contract has the injured party already received? Can the injured party be adequately compensated by an award of damages? Is the breach likely to be repeated? Will the guilty party resume compliance with his obligations? Has the breach fundamentally changed the value of future performance of the guilty party's outstanding obligations?"

466. In continuing contracts, a party's repeated breaches might justify the other in terminating the contract even absent a breach of a "condition" or a renunciation of the contract. In *Force India Formula One Team Ltd v Etihad Airways PJSC* [2010] EWCA Civ 1051, the Court of Appeal considered a series of breaches of a sponsorship agreement had cumulatively involved repudiation. Rix LJ concluded (at [87]) that there had been *"a series of repeated, or continuing, breaches which were sooner or later but ultimately repudiatory".* The discussion in *Force India* was considered by Foxton J in *SK Shipping Europe Plc v Capital VLCC 3 Corp* [2020] EWHC 3448 (Comm) (affirmed on appeal):

> "[305] It is accepted that the terms of the Charterparty which are said to have been breached were innominate terms. However, it is clear that a series of non-repudiatory breaches may cumulatively amount to a renunciation or repudiation of a contract (see *Force India Formula One Team Ltd v Etihad Airways PJSC [2011] ETMR 10*, [87]). This is more likely to be the case when the breaches are linked in their effect, or when they reflect the pursuit by the defendant of an overriding strategy (as was the case in *Force India*). However, it is still necessary to establish that the cumulative effect of the various breaches, taken together, amounts to a repudiation…"

467. Applying this to the instant case, the implied duty of trust and confidence as an implied term is a shorthand. As is clear from *Malik* and other authorities, the implied term is that the party having that duty is obliged *"not to conduct itself, without reasonable or proper cause, in a manner likely to cause serious damage to the relationship of mutual trust and confidence."* The very statement of the term confines it to conduct likely to cause serious damage to the relationship. Likewise, the implied term of good faith to refrain from conduct which in the relevant context would be regarded as "commercially unacceptable" by reasonable and honest people is not confined to conduct which is dishonest A breach or threatened breach of any of the implied terms of good faith have given rise to a right to terminate.

468. In the instant case, the breaches identified above comprise a course of conduct and/or multiple breaches, which by themselves or in their totality have gone to the root of the contract. The breaches have continued throughout the duration of the agreements and have caused serious damage to the relationship between the parties and/or amounted to commercially unacceptable behaviour and/or have undermined the terms of the bargain. This has caused distress and anguish to the franchisees who find it extremely difficult to be in a contact with a company owned and controlled by Mr Benson. Returning to the supplemental note of JBL of 17 April 2025, the complaint is not about objectionable or antisocial behaviour, but is about conduct in breach of the pleaded implied terms.

469. JBL's case is that the Claimants' action is a construct to deal with the problems caused by COVID, but they were not matters for which JBL was at fault. In my judgment, that was not the case. The breaches were of a similar character. There was a whole course of conduct such that the relationship of trust and confidence had been very seriously damaged well before the outbreak of COVID and/or comprised commercially unacceptable behaviour. This was a case of a series of multiple breaches of a similar

kind throughout the period of the agreements which became repudiatory. This behaviour continued at the time of COVID. Instead of working cooperatively with the franchisees, JBL through Mr Benson acted in an aggressive and uncooperative way prior to lockdown. Thereafter, he sought unilaterally to vary the terms of the agreements so as to secure a gain for JBL at the expense of the franchisees. He did not withdraw the attempt to vary the terms of the agreements when it was pointed out that these were unlawful unilateral purported variations.

470. I am satisfied that the breaches of contract go to the root of the various franchise agreements. Having considered the evidence above, by way of non-comprehensive summary, the following common allegations have been proven, namely:

(1) Mr Benson repeatedly made sexist, racist and homophobic remarks which franchisees found very upsetting and found a sense of shame in working with or for a business where this was so rife;

(2) repeatedly made intimidatory and abusive remarks from Mr Benson to staff at head office, to instructors and to franchisees. This included public and/or private admonitions for seemingly matters which ought to have been of little or no consequence, with the effect that franchisees were scared of Mr Benson or of stepping out of line and being concerned as to the repercussions of raising concerns or objection

(3) Mr Benson made statements repeatedly regarding suing franchisees who fell out of line, ruining their lives, taking the homes off the franchisee or their guarantor. This went far beyond the provision of information that was due to its frequency, its tone and self-pride was intended to terrify franchisees that their lives could be ruined if they stepped out of line;

(4) a restriction on the ability of franchisees to market themselves critically through the almost universal refusal to permit the personal phone numbers of franchisees to appear on their vehicles and as a result of the ban on franchisees advertising their prices;

(5) JBL unreasonably imposed sanctions, especially reducing referrals or removal from Facebook either for matters which were not breaches of contract or where the sanction was out of all proportion to the alleged breach;

(6) JBL failed to take on board the concerns about COVID on the businesses of the franchisees until after lockdown of 23 March 2020;

(7) after lockdown started, JBL unilaterally attempted to impose a variation of the franchise agreements on the franchisees by adding to the existing very long terms the weeks during which the franchise fees would not be payable. That is to be seen against the background of the already long contracts, for many the long extensions of the already long contracts leading people to wonder when they would ever be able to get out of this relationship.

471. In the instant case, the breaches identified above comprise a course of conduct and/or multiple breaches, which by themselves or in their totality have gone to the root of the contract. This takes into account the following matters:

(1) the nature of the franchise relationship and how in the circumstances of this case it is akin to an employment relationship (albeit not being a contract of employment) or a relational contract with specific features of control, of dependency, of a long-term agreement and commitment, of unbalanced obligations in the franchise agreements and of inequality of bargaining power;

(2) the nature of the term implied from the obligation of good faith and especially:

(a) the term as to trust and confidence and/or;

(b) refraining from conduct regarded as commercially unacceptable by reasonable and honest people;

(3) there have been numerous breaches of like kind throughout the duration of the agreements which have caused serious damage to the relationship between the parties and/or have undermined the terms of the bargain;

(4) this has caused distress and anguish to the franchisees who find it extremely difficult to be in a contact with a company owned by Mr Benson. Reference has been made to numerous examples of how intolerable the various franchisees found the relationship with JBL;

(5) there was every reason to believe that the abusive conduct and the consequent distress and anguish would have continued but for the discharge of the respective franchise agreements.

472. Various cases on repudiatory breach have been submitted about what conduct amounts to a repudiatory breach or a breach of the implied term of trust and confidence. Many of the cases were about a sudden loss of temper by an employer which was capable of destroying the relationship or causing serious damage to it. The instant case is very different from the single instance case. It is a case of numerous breaches of a similar character which caused, in respect of the instant Represented Claimants, serious damage to trust and confidence and/or comprised conduct which was commercially unacceptable.

473. This was not conduct which was nuanced or on a borderline. In many cases, the conduct was directed to everyone, for example, the triumphalism about court cases and obtaining judgments and possession orders. In other cases, in respect of abusive and humiliating behaviour, it had a knock on effect beyond he person to whom it was directed because it instilled fear that if another franchisee crossed Mr Benson's path, there would be trouble. The effect of numerous incidents have led to a collective sense of fear of him by these Claimants. The common accounts are not because they have embellished an account for the purpose of justifying early termination, but because it reflects the multiple instances of commercially unacceptable behaviour.

474. The Claimants have proven their case by relying on the common breaches. This has obviated the need to prove claimant by claimant the specific breaches in relation to such claims. In some instances, as described above, specific allegations of individual claimants have been proven and they have been confirmatory of or contributed to the common breaches. Even where specific allegations have not been proved, the evidence has provided a context in which to judge the alleged breaches of contract, and in particular the breaches common to the Claimants generally.

475. This is a case which is decided on its own facts. Neither in the conclusions about the implied terms or in the findings on the facts of this case of repudiatory breaches of contract does it have any direct application to other franchise networks. Further, it is a case about agreements which were terminated almost five years ago. It does not therefore a bearing upon, or application to, the current contractual relationships of JBL. On the evidence of this case, I am satisfied that the breaches of the contracts of the Represented Claimants has been proved to the extent set out above and that they have been repudiatory, such as to entitle the Represented Claimants to terminate subject to any affirmation of the agreements. It is to that part of the third issue to which this judgment now turns.

(b) The chronology about termination of the franchise agreements

476. According to the admitted facts, on 19 August 2020, the First to Ninth Claimants all received advice from solicitors, namely those who act for them in this action, namely Aquabridge Law. The inference is that in the weeks prior to 19 August 2020, there were discussions between various franchisees, which led to legal advice being taken by these Claimants.

477. Aquabridge Law sent to JBL a without prejudice letter on 14 September 2020 in which allegations were made, but without identifying the names of these Claimants for fear that their position as franchisees might be prejudiced. Since the letter was without prejudice, the Court has not been shown the letter, but it is to be inferred that there must have been allegations of dissatisfaction made on behalf of the nine Claimants then not identified. It appears that JBL was not prepared to engage in negotiation with unidentified franchisees.

478. On 5 October 2020 an open letter was sent by Aquabridge Law naming the first nine Claimants. That letter contended that there was either an employment relationship or one in which the parties owed duties of good faith to one another due to the long-term nature of the commercial relationship of the parties and importing duties of cooperation and trust and confidence among other duties. It alleged fourteen respects in which these duties had been breached. It alleged that the conduct was commercially unacceptable and comprised a repudiatory breach of contract. It reserved a right to terminate for repudiatory breach.

479. According to the admitted facts, on 12 October 2020, the parties attempted ADR through mediation, but evidently without success. On 13 October 2020, Aquabridge Law send an e-mail requiring a substantive response to the matters contained in the letter of 5 October 2020 by 4:00pm on 14 October 2020. Just after that time, Holmes

& Hills stated that they regarded the timetable for responses as unreasonable and would revert in due course as necessary.

480. On 19 October 2020, Aquabridge Law wrote by an email timed 4.17pm, saying that no more time was required to address the numerous allegations and took the view that JBL was either unwilling or unable to do so. In those circumstances, notice was given that each of the first nine Claimants exercised their right to elect to accept JBL's repudiation of their respective contracts. It asserted that they were discharged with immediate effect.

481. Just over two hours later on the same day, Holmes & Hills replied saying in effect that the e-mail of 5 October 2020 did not comply with the pre-action protocol. It denied that JBL was in breach of the franchise agreement or that the first nine Claimants were entitled to take action to terminate the agreement. It stated that their purported termination was a repudiatory breach of contract. It said that JBL was entitled either to accept the breach as terminating the agreements and claim damages or to continue to comply with the agreements.

482. According to the admitted facts, on 10 November 2020, the Tenth to Eighteenth Claimants received advice from Aquabridge Law. They said that they wished to remain anonymous at that stage for fear of reprisal for having taken steps to investigate and assert their legal rights. They were referred to as a group of instructors. The e-mail was written in very similar terms to the e-mail on behalf of the first nine Claimants: there were ten allegations largely overlapping with the allegations made on behalf of the first nine Claimants.

483. On 19 November 2020, Holmes & Hills replied that they could not engage with anonymous franchisees. In order to respond substantively JBL would have to know the identity of those clients. They suggested a period of 21 days to respond in view of the then national lockdown. They said that if there was a termination without an opportunity to engage properly it is likely that JBL would hold them to be in repudiatory breach and would accept that breach and claim damages.

484. On 4 December 2020, Aquabridge Law identified the Tenth to Eighteenth Claimants, and said that the precise identities of the clients were not necessary in order to address the concerns and no more time was needed to address the various allegations. On behalf of those Claimants, their agreements were terminated for repudiatory breach with immediate effect.

485. According to the admitted facts, on 15 December 2020, Ms Thornton, the Nineteenth Claimant, received advice from Aquabridge Law. On 22 December 2020, these solicitors gave notice of termination of her agreement for repudiatory breach alleging an oppressive and untenable working environment and citing a post on the Just Benson Facebook page. That was a reference to the post which referred to franchisees lying their way out of agreements, He said: *"...I think most of you know this company does not lose money to in this case nasty greedy people; Two can play at that. Give me some credit. Although they may have found a way to lie out of their agreements they have not left behind or sneaked out of damages claims. A lot of people and/or their guarantors are going to have a deservingly [sic] and horrible life changing 2021/2022 onwards".*

486. The last relevant termination was by Ms Freeman, the Twentieth Claimant, following receiving advice on 15 February 2021. She gave notice in writing by Aquabridge Law on her behalf by an email dated 22 February 2021. This email also referred to an oppressive and untenable working environment and referred to the previous correspondence containing the legal framework of the claims. It gave notice of termination of the agreement of Ms Freeman for repudiatory breach.

487. Ms Freeman had previously on three occasions in writing given notice to JBL that her contract ended on 16 January 2021, and that she would not be renewing. She had sought confirmation that her understanding that her agreement would end on that date was correct. Those emails were dated 14 July 2020, 27 August 2020 and 26 November 2020. There was no response to each of the emails, as a result of which Ms Freeman telephoned the office and was told that she would have to work until December 2021. This provides some explanation as to why she took legal advice at a later stage than the others in that she believed that the agreement would expire by effluxion of time. The information was to the effect that almost a year more was required. In fact, when it came to the counterclaim, there was added a further 26 weeks of coronavirus 'suspension' of 26 weeks as a result of which it was said that the end date would have been 8 June 2022. This is an example of a franchisee who struggled with reason to identify the length of the agreement and was not assisted despite three written requests to identify the termination date as contended for by JBL.

(c) The law about election to terminate or to affirm

488. It is well established that an innocent party has an election as to whether to accept the breach as discharging the contract or to affirm the contract. There is a dispute between the parties. The Claimants submit that they elected to accept the breach or breaches as discharging them and each of them from their respective contracts. JBL has submitted that the right to terminate, if it ever existed, has been lost by affirmation of the agreements and each of them.

489. The Claimants rightly accept that in the context of an alleged repudiatory breach, the innocent party will lose the right to terminate the contract if he communicates to the other party unambiguously his intention to affirm it or waits too long before giving notice of termination. The principles were set out by Browne Wilkinson J in the Employment Appeal Tribunal in *WE Cox Toner (International) Ltd v Crook* [1981] I.C.R. 823 at 829C-F in the following terms:

> "It is against this background that one has to read the short summary of the law given by Lord Denning M.R. in the Western Excavating case [1978] I.C.R. 221 . The passage, at p. 226:
>
> > "Moreover, he must make up his mind soon after the conduct of which he complains: for, if he continues for any length of time without leaving, he will lose his right to treat himself as discharged."
>
> This is not, and was not intended to be, a comprehensive statement of the whole law. As it seems to us, Lord Denning

> M.R. was referring to an obvious difference between a contract of employment and most other contracts. An employee faced with a repudiation by his employer is in a very difficult position. If he goes to work the next day, he will himself be doing an act which, in one sense, is only consistent with the continued existence of the contract, i.e. he might be said to be affirming the contract. Certainly, when he accepts his next pay packet (i.e., further performance of the contract by the guilty party) the risk of being held to affirm the contract is very great: see Saunders v. Paladin Coachworks Ltd. (1967) 3 I.T.R. 51 . Therefore, if the ordinary principles of contract law were to apply to a contract of employment, delay might be very serious, not in its own right but because any delay normally involves further performance of the contract by both parties. It is not the delay which may be fatal but what happens during the period of the delay: see Bashir v. Brillo Manufacturing Co. [1979] I.R.L.R. 295.
>
> Although we were not referred to the case, we think the remarks of Lord Denning M.R. in the Western Excavating case are a reflection of the earlier decision of the Court of Appeal in Marriott v. Oxford and District Co-operative Society Ltd. (No. 2) [1970] 1 Q.B. 186 . In that case, the employer repudiated the contract by seeking to change the status of the employee and to reduce his wages. The employee protested at this conduct but continued to work and receive payment at the reduced rate of pay for a further month, during which he was looking for other employment. The Court of Appeal (of which Lord Denning M.R. was a member) held that he had not thereby lost his right to claim that he was dismissed. In the Western Excavating case Lord Denning M.R. explains, at p. 227, that the case would now be treated as one of constructive dismissal. This decision to our mind establishes that, provided the employee makes clear his objection to what is being done, he is not to be taken to have affirmed the contract by continuing to work and draw pay for a limited period of time, even if his purpose is merely to enable him to find another job."

490. This recognises as in other respects (for example in respect of restrictive covenants or implied terms) that in a contract of employment an employee may be treated differently and sometimes more tenderly than between parties of equal bargaining power in a commercial contract.

491. The law applies a realistic approach, especially in employment contracts, to affirmation by giving the innocent party a reasonable time to decide whether or not to terminate: see *Air Canada v Lee* [1978] IRLR 392. In *Buckland v Bournemouth University* [2010] EWCA Civ 121, Jacob LJ said:

> "When an employer commits a repudiatory breach there is naturally enormous pressure put on the employee. If he or she

> just ups and goes they have no job and the uncomfortable prospect of having to claim damages and unfair dismissal. If he or she stays there is a risk that they will be taken to have affirmed. Ideally a wronged employee who stays on for a bit whilst he or she considered their position would say so expressly. But even that would be difficult and it is not realistic to suppose it will happen very often. For that reason the law looks carefully at the facts before deciding whether there has really been an affirmation." (emphasis added)

492. In that case, it was held that Professor Buckland did not affirm the contract despite the passage of 7 months since the repudiatory breach and took into account the fact that he was entitled to have regard to the adverse effect that an earlier departure would have had upon his students.

493. A similar approach to the question of affirmation was taken by the Court of Appeal in *Bliss v South East Thames Regional Health Authority* [1985] IRLR 308, reversing the decision of the trial judge that Mr. Bliss had affirmed his contract by continuing to accept payment of salary. In *Sheet Metal Components v Plumridge* [1974] IRLR 86, [1974] ICR 373 the employees worked for two months without losing right to claim constructive dismissal. Further, in *Lewis v Motorworld Garages Ltd* [1986] ICR 157, the Court of Appeal held that even if a party has waived repudiatory breaches in the past, he may pray in aid the earlier breaches if later he leaves as a result of further conduct that may have contributed to a breach of the implied term.

494. JBL points to the charterparty case of *SK Shipping Europe plc v Capital VLCC 3 Corp & anor* [2020] CLC 816 at para. 201 and following. It is apparent that whilst the broad principles about affirmation are not different for an employee in an employment contract from a charterer or shipowner in a charterparty or an insurer or commercial insured in an insurance contract, the fact intensive process recognises the particularly difficult position of an employee having to make a decision with such important consequences: see the quotation above of Browne Wilkinson J in *WE Cox Toner (International) Ltd v Crook* as quoted above.

495. Even in the commercial context, a part of Foxton's judgment in the *SK Shipping Europe* case (in the case of affirmation as a bar to rescission, but of application to affirmation of a contract in the alternative to termination for repudiatory breach) is at para. 203 as follows:

> "(v) Because an election once made is final and irrevocable, the party making the election is entitled to a reasonable time to make a decision, the length of which will depend on the particular circumstances: McCormick v National Motor & Accident Ins Union (1934) 49 Ll L Rep 361, 365 (Scrutton LJ) . This is so even if, during that period, the party with the right of election is exercising rights under the contract (in that case the liability insurer's right to conduct the insured's defence).

> (vi) Nor does mere lapse of time of itself amount to an election unless it is of such a length of time as to demonstrate an unequivocal decision to elect: Scandinavian Tanker Trading Co AB v Flota Petrolera Ecuatoriana (The Scaptrade) [1981] 2 Ll Rep 425, 430."

(d) Application of the law to the facts

496. By reference to the *SK Shipping Europe* case, JBL accepts that the Claimants could not affirm their contracts until after they had knowledge of their right to do so (para. 202(i)). JBL submits by reference to para. 202(v) that whilst it is difficult to show that they had that knowledge, there is a presumption that a party with a legal adviser would have such knowledge which presumption can be displaced. Accordingly, it is submitted that such knowledge can be presumed to have been acquired from the involvement of their solicitors, Aquabridge. Law It relies on the period of two months after 19 August 2020 prior to the termination of the agreements of the first nine Claimants during which they continued to pay their fees as an affirmation, and in the case of Mr Robins to take training, acting as if their agreements continued. They recognise that during that period of time, there was a without prejudice as to costs letter of 14 September 2020 and an open letter of 5 October 2020. The former letter has not been shown to the court because it was the subject of joint privilege.

497. I am satisfied that there has been no affirmation in respect of each of the Represented Claimants. I have reached that conclusion bearing in mind the following considerations.

498. First, there was a need for advice in connection with a complicated long-term agreement. There was a lot to consider before terminating such a relationship. On the one hand, the franchisee would end up without employment or a business. There was no possibility of selling the business on. On the face of it, there was a restriction on competition for three months after termination (although those restrictions would not survive a repudiatory breach). On the other hand, the franchisee might, if there was no repudiatory breach, render themselves liable for damages, and in many cases of sums which were colossal relative to their earnings. Based on Mr Benson's postings on Facebook, the franchisees knew that they could expect claims from Mr Benson on behalf of JBL who wrote and spoke about his cases in an aggressive, and allegedly intimidatory, manner. It followed that there was an agony about the decision which needed time both in order to receive the advice and to decide what to do. There was law to decide both about employment law and the law of contract, some of which involved developing legal principles. The factual basis of their claim was detailed and complex. This was very far removed from a binary decision which a lawyer instructed throughout could advise upon as might be the case in the shipping or insurance cases referred to above.

499. Second, whilst each incident was separate in time, the general allegations were continuing. For example, if there was a unilateral variation of the agreements to extend their duration by adding the periods of suspension, that was continued each time there was a Covid suspension. It was not only by the email of 24 March 2020, but also in further communications including one of 15 June 2020, and thereafter it continued to

hang over franchisees. If the allegations of intimidatory conduct are upheld (for example about litigation in the terms used) or racist behaviour as alleged, they continued unabated. Further, despite having agreed in January 2020 to allow franchisees to fix their prices, on 29 September 2020, Mr Benson on behalf of JBL sent a letter to franchisees increasing the prices of lessons, thereby contradicting for a further time the instructors' right to set their own prices. These were no single alleged breaches of contract, but a course of conduct in which the impact was said to be continuing on the franchisees.

500. Third, there was no representation to JBL that the conduct was being accepted or that the agreements were affirmed. On the contrary, the engagement with JBL on behalf of franchisees started from mid-September 2020 both without prejudice and then openly, with franchisees not identified and then identified. During this engagement, the fact that franchise fees were being paid or the agreements performed would not have been received as an affirmation of the agreements because it was known that franchisees were considering their positions.

501. Fourth, it is apparent first that there was significant fear about coming forward and identifying themselves in view of the way in which dissenting and terminating franchisees had been treated in the past. That explains the wish in the first instance to be anonymous and test the water before coming forward. Whether or not that fear is well placed depends on the approach of the Court to the allegations of intimidatory conduct. Given the Court's approach to the allegations of intimidatory conduct, that fear was well placed.

502. Fifth, bearing in mind the enormity of the consequences of the decision, it is understandable that the Claimants wished to engage with JBL before making a decision as to whether to terminate. Hence, engaging with JBL on a without prejudice basis by the letter of 14 September 2020 or by mediation on 12 October 2020 or by open letters seeking responses on 5 and 13 October 2020 does not amount to an affirmation, but was a part of a process of trying to resolve the matter and/or hear the other side of the matter, prior to deciding whether to accept the alleged repudiation. This was all very different from the party who reserves rights whilst at the same time as taking substantially the benefit of the contract.

503. The relative timidity or caution of the other Claimants does not make their position significantly different in view of the four numbered points above. This was not the case of a single event such as a variation in terms of an employment contract where the employee lived with it, and only thereafter alleged that it was repudiatory. These are allegations of conduct which repeat themselves and/or are of a continuing nature, and on the case of the Claimants progressively undermining trust and confidence (alleged to be an implied term of the relationship). The Tenth to Eighteenth Claimants did not delay so long that it could not have been expected that there would be no other Claimants coming to join those already identified. It was a relatively short period of time between the time of the termination of the first nine Claimants on 19 October 2020 and the taking of advice of the Tenth to Eighteenth Claimants taking advice from Aquabridge Law on 10 November 2020. They sent an open letter through Aquabridge Law on 12 November 2020, to which there was no substantive answer because they did not identify themselves at first. They terminated on 4 December 2020.

504. In my judgment, these Claimants did not because of their hesitation have such a period of delay as amounted to an affirmation of the agreements. It is said that the continuing payments of franchise fees amounted to an affirmation. I do not accept this proposition in that the Claimants required time to consider their position and if they withheld payment during this period, then under the terms of the agreements, JBL could have treated this as a breach of a fundamental term whereupon it would have been the Claimants, and not JBL, who would have been in repudiatory breach. Further, the various considerations relevant to there being no affirmation on the part of the first nine Claimants applied also to these Claimants, such that the allegation of affirmation is not made out.

505. As regards the Nineteenth Claimant, Ms Thornton, although there was delay on her part in bringing the application, she is still able to refer to continuing breaches. She is also able to invoke the Facebook posting of 14 December 2020 which went beyond notification and was a further instance of intimidatory conduct of a kind with the conduct complained of by the first eighteen Claimants. In any event, I do not regard the delay in her case of such a magnitude as to give rise to an affirmation, nor do I regard her conduct, particularly in paying the franchise fees, as amounting to affirmation. She received advice on 15 December 2020, and she served notice of termination through a letter of Aquabridge Law on 19 December 2020, that is to say just after a fortnight after the letter on behalf of the Tenth to Eighteenth Claimants.

506. As regards the Twentieth Claimant, Ms Freeman, she had thought that her agreement was about to expire by effluxion of time. Only following none of three emails to that effect being attended to, she was confronted for the first time with the assertion that her agreement would not expire until December 2021. In fact, in the Counterclaim, the case of JBL became that Ms Freeman's agreement would not expire until June 2022. The extra period of six months was based on the alleged extension of the agreement as a consequence of JBL's communications of 24 March 2020 and 15 June 2020, which the Claimants say was a unilateral variation of the agreement. It was at that point that Ms Freeman needed to confront for the first time the impact of the breaches and whether she too should terminate her agreement early. Looking at her case in that context, there was no question of her affirming the agreement. Given that it was apparently about to end, there was no point in her becoming involved in acceptance of repudiatory breach. It is JBL which caused the delay in the termination by not contradicting the belief of Ms Freeman that her agreement was to terminate despite three unanswered emails referring to a belief that her agreement was about to expire. When finally, JBL asserted that the agreement would continue until December 2021, then for the first time Ms Freeman had to consider her position. Given that JBL knew of her misapprehension (on their case) about term of her agreement, they could expect that there was no point in her terminating for breach, and the absence of such a termination did not amount to an affirmation of the agreement. When the position of JBL was made known, Ms Freeman received advice on 15 February 2021 and terminated on 22 February 2021. As with the other defendants, I do not regard her position as being any different the delay in her case of such a magnitude as to give rise to an affirmation, nor did her conduct, particularly in paying the franchise fees, amount to an affirmation of her agreement.

XVI Conclusion

507. It follows from the above that the three preliminary issues are resolved as follows:

(1) on the first preliminary issue, the implied terms contended for by the Claimants and in particular of good faith are found to be implied in fact into the various franchise agreements;

(2) on the second preliminary issue, JBL has been in breach of the implied terms in the respects found to be the case;

(3) on the third preliminary issue, JBL has been in repudiatory breach to the respective Claimants through the common breaches and the Claimants did not waive their right to terminate for breach, and each of them treated their respective agreements as discharged by breach.

508. This has consequences for the future of the action and especially the counterclaim. The only relief that the Claimants is a declaration that their respective franchise agreements were lawfully discharged and that they are no longer bound by any terms of their respective franchise agreements. The Court wishes to receive submissions as to what the Court ought to do as regards the unrepresented claimants who did not attend trial. The parties are asked to liaise about the production of a minute of order to reflect this and to deal with consequential matters.

509. It remains to pay tribute to the quality of the advocacy of all three Counsel, that is both Mr Butler KC and Ms Higgo (who herself cross-examined a number of the Claimants) for JBL as well as Mr Stephens for the Represented Claimants. All of them displayed great industry, attention to detail and familiarity with and experience of the relevant areas of law.