

JERSEY / JUDGMENT

Hard Rock Ltd and Another -v- HRCKY Limited [2016] JRC 157 (09 September 2016) [2016] JRC 157

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judgment

the master:

Introduction

1. This judgment represents my detailed written reasons in relation to an application for specific discovery brought by the defendant, which I granted in part and refused in part.

Background

2. The issues between the parties were summarised at paragraph 2 to 4 of the last judgment I gave in this dispute reported at Hard Rock Ltd v HRCKY Ltd

[2016] JRC 129 as follows:- "2. The general background to this dispute is set out in an earlier decision in this matter reported at Hard Rock Ltd and Another-v-HRCKY Ltd

[2013] JRC 244B at paragraphs 3 to 12 which I adopt. 3. The effect of this decision is that the only live issue between the plaintiffs and the defendant is the defendant's counterclaim. The defendant has therefore effectively become the plaintiff in respect of the sole remaining issue although I will continue to refer to it as the defendant. 4. Following on from a second judgment in this matter reported at Hard Rock Ltd and Another-v-HRCKY Ltd

[2015] JRC 117 , the remaining issues between the parties arising out of the counterclaim are as follows:- (i) Whether there is an implied term of the franchise agreement that the parties would cooperate with each other in good faith in order to promote the values and purposes express or implicit in the franchise agreement. (ii) The plaintiffs by reference to following paragraphs of the amended answer are said to have breached the above implied term by: - (a) refusing to accede to requests to reduce portion sizes and vary the prescribed menu (paragraph 19); (b) refusing to permit the defendant to reduce its opening hours (paragraph 20); (c) insisting that the defendant participated in a loyalty programme (paragraph 21); and (d) requiring the defendant to employ a number of

managers whom the defendant claims it was forced to dismiss for dishonesty or incompetence. (iii) The other dispute between the parties concerns an allegation that the plaintiffs represented that, if the defendant entered the franchise agreement, it could expect to make returns of between 15% to 30% per year and that its outlay/investment could be claimed back within three years, to five years - (see paragraph 24(D) of the amended answer). (iv) The defendant alleges that this representation was made by the plaintiffs either with knowledge that it was untrue or alternatively the plaintiffs were reckless as to whether the statement was or was not true or made in bad faith. Paragraph 24(F) of the amended answer states "in truth and in fact the plaintiffs were aware at the time of making the representations and thereafter that the restaurant business is only profitable in very few locations and in the majority locations it was unprofitable and loss making. Where the restaurant business outgoings are high as in the Cayman Islands, a matter of which the plaintiffs were well aware - it would be unprofitable if run in accordance with the plaintiffs' business model which it required as a term of the franchise agreement. Had the defendant been aware of this fact it would not have entered into the franchise agreement or expended the very substantial sums it has expended which have been lost."" 3. The dispute itself however goes back to 1999 when the defendant entered into a franchise agreement with the first plaintiff and a related agreement called a memorabilia lease with the second plaintiff. The counterclaim therefore covers the period between 1999 and 2013 when relations between the parties broke down. It was also in 2013 that the defendant first raised a counterclaim in its answer to the plaintiffs' claim based on breach of an implied term of good faith (see paragraphs 58 and 59 of the judgment in this dispute reported at *Hard Rock Ltd v HRCKY Ltd*

[2013] JRC 244B). The question of misrepresentation was raised for the first time in the application that led to the judgment in this matter reported at *Hard Rock Ltd v HRCKY Ltd*

[2015] JRC 117 , (see paragraphs 5 and 18 to 27). The question of when issues were first raised is relevant to submissions made on the adequacy of the affidavit of discovery filed by the plaintiffs and questions of whether documents still exist or have been destroyed, both in the view of the time period covered by the present dispute and the length of time this litigation has taken to date. 4. By the time the matter came for argument, the defendant had limited its request to the material set out in its re-amended summons as follows:- "1.1 Documents and/or schedules (including without limitation in native file format) that contain or comprise financial information evidencing and/or supporting the details of calculations and/or assumptions and/or estimates adopted in preparing the documents titled 'Spreadsheet: HRC Grand Cayman Profit & Loss Statement showing Year 1; Periods 1 - 12' and 'Spreadsheet: Sales Analysis - Base Year (Year 2)' listed as documents SD001 and SD002 respectively, in Schedule 1 Part 1 of the Second Affidavit of Rebecca Roby dated 25 February 2016; and Documents and/or schedules (including without limitation in native file format) that contain or comprise financial information evidencing and/or supporting the details of calculations and/or assumptions and/or estimates relied upon in the preparation of the schedule titled "HRC Grand Cayman Profit & Loss Statement - Break

Even Analysis" (for Year 1 through 5), listed as document 472 in Schedule 1 Part 1 of the Affidavit of Discovery of Kevin Joseph Doyle dated 24 September 2015.. 1.2 Documents and/or schedules (including without limitation in native file format) that contain or comprise financial information evidencing and/or supporting the details of calculations and/or assumptions and/or estimates adopted in preparing the document titled 'Collection of documents relating to application for approval to open Grand Cayman café' listed as document number SD006 in Schedule 1 Part 1 of the Second Affidavit of Rebecca Roby dated 25 February 2016. 1.3 All correspondence between Kevin Doyle and Sam Marable during the period of 1 January 1998 to 11 June

1999. Including, but not limited to, emails received and/or sent from the following email addresses:

- (i) doyle@candw.ky (ii) Sam-marable@hardrock.com 1.4 Internal notes, minutes or any other record of the meetings prepared by or on behalf of Sam Marable which took place between October 1998 and June 1999 in respect of the prospects and establishment of the Cayman franchise business; 1.5 The "Manuals" (as defined in the Restaurant Franchise Agreement dated 11 June 1999 (the RFA)) which, pursuant to the RFA were required to be provided to the Defendant, in its capacity as Franchisee, at the date of the execution of the RFA 1.6 The following accounting or financial records and reports and other documents (covering Americas 1, Americas 2, Asia-Pacific North, Asia-Pacific South, Europe 1, Europe 2 and Middle East) for the period 1998 - 2013 inclusive: (i) Hard Rock International Franchised Cafes, Hotels, Casinos, and Licensed Other Retail Period Results (ii) End Month AR Aging Summary (iii) Franchise KPIs (iv) Franchise Summary
- (v) Franchise v Budget Report 1.7 Profit and loss accounts (and any accounting or financial records and reports and other documents relating to and/or which form the basis of the profit and loss accounts) and Profit Summary for the Hard Rock Café units in San Juan, St Thomas and Key West for the period 1998 - 2013 inclusive. 1.8 The following documents prepared for each of the financial periods from 1998 to 2004 and 2011 to 2013 inclusive:
 - (i) Hard Rock Café
 - Active Units- Cafes Restaurant Only Summary (ii) Hard Rock Café
 - Active Units - Cafes Restaurant EBIT (%) (iii) Hard Rock Café
 - Active Units - Cafes Restaurant + Merchandise Summary (iv) Hard Rock Café
 - Active Units - Cafés Industry Benchmark Comparison 1.9 Not pursued 1.10 Financial statements and any audited accounts prepared by each of the Plaintiffs for the period 1998

- 2013 inclusive. 1.11-1.12 Not pursued 1.13 The Hard Rock - Cayman Islands Best Practice Evaluation reports completed in respect of the Cayman Islands franchise for each of the years during the period 2000 - 2010 inclusive. 1.14 Documents and/or schedules (including without limitation in native file format) that contain or comprise financial information evidencing and/or supporting the details of calculations and/or assumptions and/or estimates contained in:
 - (i) Table 7 on page 39. (ii) Figure 38 and Figure 39 on page 42. (iii) Section 7.5.3 on page 82. of the 'Confidential Information Memorandum' dated August 2006 prepared by Merrill Lynch, listed as document number OGR00004207 in Schedule 1 Part 1 of the Supplemental Affidavit of Discovery of Kevin Joseph Doyle dated 15 April 2016 1.15 The HRI Strategic Plan Financial Summary dated 11 August 2010. 1.16 The 2006 year end period 12 report prepared by Paul Compton/Jo Merrill." 5. The application was supported by the fifth affidavit of Keith Doyle which was ultimately sworn on 22 nd July, 2016, although an approved draft had previously been provided to the plaintiffs. An affidavit in opposition to the application and the draft fifth affidavit was sworn by Rebecca Roby, Vice President of Business Affairs of Hard Rock Café International (USA) Inc., sworn on 21 st July, 2015. 6. Both parties initially provided affidavits of discovery in September 2015. The plaintiffs provided supplemental discovery pursuant to the second affidavit of Rebecca Roby dated 29 th February, 2016. A supplemental affidavit of discovery was provided by the defendant, sworn by Mr Doyle on 18 th April, 2016. Legal test 7. There was no dispute between the parties on the applicable legal test on a specific discovery application which was accepted and summarised in the first paragraph of the head note of Vilsmeier v AI Airports International Limited and PI International Limited
- [2014] JLR Note 26 as follows:- "On an application for specific discovery, an applicant is required to show (a) a prima facie case that the defendant has, or has had, documents that have not been disclosed; (b) that the documents in question are relevant to matters in issue in the case-relevance is determined, primarily, by reference to the issues pleaded; and (c) that an order for specific discovery is necessary for disposing fairly of the case (Victor Hanby Associates Ltd. v. Oliver, 1990 JLR 337 , applied; Trustcorp Ltd. v. Barclays Private Bank & Trust Ltd., 2007 JLR N [24], applied). Specific discovery should not be ordered where it is sought solely for cross-examination as to credit (Thorpe v. Greater Manchester Police (Chief Const.), [1989] 1 W. L. R. 665, applied)." This is the test I have applied. The parties' general observations 8. Before making detailed observations on the individual requests, both Advocate Sanders and Advocate Garrood made general observations on the application, which it is appropriate to record. 9. Advocate Sanders therefore made the following general observations:- (i) The question of relevance should be looked at broadly in particular in the context of the argument about whether or not there was an implied term of good faith and whether or not it had been breached. Whether or not there had been a breach of any implied term of good faith or any deliberate misrepresentation was complex. This could be seen by reference to the type of questions that would be asked in assessing a lack of good faith as set out at paragraph 13 of the previous judgment in this dispute reported at

[2016] JRC 129 . (ii) What is at the heart of this case is the plaintiffs' knowledge of the lack of viability of their franchise arrangements and their alleged failure to disclose this or to agree to variations to the operation of the franchise agreement. (iii) It is in issue from paragraph 19 of the amended answer that the restaurant side of the franchisee's business was structurally loss making. Paragraph 19 is denied and in the reply at paragraph 21 it is averred that there was no prohibition on any cross subsidy which was said to be an advantage of the plaintiffs' franchise agreements. Some analysis had also been produced by the plaintiffs on discovery but not the underlying analysis that went to the heart of the defendant's claim and the defence to it as set out in paragraph 19 of the answer and paragraph 21 of the reply. (iv) The defendant wanted the underlying analysis that the plaintiffs possessed because its case was that it was a breach of the implied term of good faith to impose a loss-making model and to refuse to vary it. (v) The same analysis applied to the allegation at paragraph 21 of the amended answer that the first plaintiff insisted the defendant participated in a loyalty programme. (vi) In respect of the misrepresentation claim, while this focused on the period prior to entry into the franchise agreement, according to Advocate Sanders, there was an ongoing failure to inform franchisees, including the defendant, that they were not going to make any money out of the restaurant side of the franchise agreements because in the majority of locations the restaurants were unprofitable and loss making. The allegations of misrepresentation therefore overlapped with the allegations of a breach of an implied term of good faith in the sense that again what was key was the plaintiffs' knowledge. 10. Advocate Garrood in response to these general observations contended as follows:- (i) In overall terms when the defendant entered into the franchise agreement the franchise arrangements were profitable when looking at the combined offering of restaurant and merchandise sales. (ii) The plaintiffs were contending that the lack of profitability of the restaurant was due to factors within the defendant's control including the location of the restaurant and how it was run on a day-to-day basis. What underpinned documents already disclosed was not relevant to this issue. (iii) The defendant's approach was implicitly looking to argue for a guaranteed profit. However, any claim for a guaranteed profit had already been rejected in the earlier decision reported at

[2015] JRC 117 at paragraphs 10 to 15. The franchise agreement was not a guarantee to make money but was a commercial risk for the defendant. (iv) What the defendant was seeking was cross-examination material, which it was not entitled to. The defendant was able to formulate in its claim from the material it already had in its possession and its own records. (v) The scope of the material sought by the fifth affidavit of Mr Doyle related to the allegations of dol rather than the breach of any implied term. Financial records after 1998 and 1999 were therefore irrelevant. (vi) There was no need for the defendant to have the materials sought in order to advance its case. (vii) The Court should also bear in mind the proportionality limb of the test to be applied. What was being asked for was potentially vast amounts of documentation, assuming it still existed. (viii) Some of the material did not exist in any event because of the destruction policies the plaintiffs applied in the

ordinary course of their business operations. Had the plaintiffs brought their claim more promptly then such material might have been preserved. (ix) The implication of an implied term if permitted by the Court did not require an approach based on a broad test of fairness. Allegations of breach of an implied term were to be evaluated adopting the words of the Yam Seng case cited at paragraph 9 of the

[2016] JRC 129 decision in this matter "by attributing to them the purposes and values which reasonable people in their situation would have had." In the context of the franchise agreement it was a factual question for the Jurats whether the conduct of the plaintiffs in protecting their legitimate business interests, as they saw those interests, was justified. (x) The position of other jurisdictions was irrelevant because the defendant had control of the location of their franchise agreements and how they ran them. (xi) The operation of the loyalty programme was a separate issue to the operation of the franchise agreement; evidence in relation to that agreement did not therefore assist in relation to alleged breaches of the franchise agreement. 11. Advocate Garrood accepted that his clients could not deny what documents revealed about profitability of the restaurant business in Cayman. He was also not in a position to comment on the profitability of restaurants operated under franchise agreements more generally. However, the issue was whether the franchise agreements granted by the plaintiffs were profitable as a whole at the time the defendant entered into its individual franchise agreement. It did not matter if one part was not generally profitable. 12. In relation to these rival submissions both have potential force. Some of the points will also be developed at trial both in relation to whether or not the implied term contended for by the defendant should form part of the franchise agreement and, if it should, whether it has been breached. 13. Equally there is an issue between the parties about their respective state of knowledge in particular what was said by the plaintiffs to the defendant when the defendant entered into the franchise agreement and what the plaintiffs knew at that time. In my judgment such knowledge of the profitability of the franchise agreements is relevant to the requests to vary opening hours and menus as well as being relevant to the issue of dol . While there is no basis to argue that a profit was guaranteed for the reasons given in the judgment reported at 2015 JRC117 in this matter, I do not agree with Advocate Garrood that what the plaintiffs did in response to a request is the only relevant evidence the Royal Court should be invited to look at. I consider the defendant is justified in contending whether what the plaintiffs did was a breach of the alleged implied term by reference to the plaintiffs' state of knowledge at the time the request was made. How far this might lead to an order for specific discovery however has to be determined on a category by category basis, applying the tests in *Vilsmeier v AI Airports Int Ltd & PI Power Ltd* set out above. Just because something may exist and may be relevant does not mean it is necessary to make a discovery order for the issues between the parties to be explored fairly at trial. Necessity can cover a number of factors including an evaluation of what steps are required to produce documents, how much material has to be reviewed and how relevant the category of documents sought is likely to be when set against the value and complexity of the claim.

14. In reaching the decisions I reached in respect of the individual requests I have therefore weighed in the balance, applying the tests set out in Vilsmeier, the competing general contentions set out by the parties, where relevant to the particular request, in addition to taking into account the specific submissions made in respect of each category.

15. With these specific requests in mind I now turn to deal with the different categories of requests sought by the defendant, adopting the numbers of the defendant's re-amended summons set out above. The Specific Requests Requests 1.1 and 1.2

16. In respect of these requests it is convenient to deal with them together.

17. Both of these requests arose out of spreadsheets numbered ST001, ST002 disclosed by the plaintiffs which were spreadsheets setting out projections of gross revenues for a Hard Rock restaurant in the Cayman Islands. The defendant had further disclosed at document 472 of its list of documents a schedule entitled HRC Grand Cayman profit and loss statement provided to Mr Doyle prior to the franchise agreement being entered into. The defendant therefore sought documents containing the financial information evidence and all supporting details of the calculations or assumptions relied on by the plaintiffs in producing these different spreadsheets/statements. The same information was also sought in respect of a consideration by the plaintiffs of opening its own Hard Rock Café restaurant in the Cayman Islands considered in document SD006. The defendant argued that this information was relevant to show the extent of the plaintiffs' knowledge both when the franchise agreement was entered into and, subject to such knowledge not having altered, at the time of the claim for breach of an implied term. This knowledge was key according to the defendant to evaluate both any statements made by the plaintiffs about the profitability of a franchise operation and the plaintiffs' response to requests to vary certain terms of the franchise agreement.

18. Advocate Garrood in response suggested this was material simply to cross-examine the defendant as to credit. The defendant did not need the underlying information in order to prove any aspects of its case. The issue is whether representations were made. The defendant had the spreadsheets showing the plaintiffs' state of knowledge; the underlying assumptions and the material upon which the spreadsheets were based was not necessary for the Royal Court to decide whether or not the statements contained in the spreadsheets were true or misleading. The defendant in addition could adduce evidence from an expert accountant to set out why the information in the spreadsheets was misleading. It did not require further discovery. Advocate Garrood also reminded me of his general observations concerning whether or not the disclosure sought was necessary. As set out in the second affidavit of Rebecca Roby, the plaintiffs had carried out detailed searches as could be seen from identifying the search terms used. However he fairly made it clear that he could not say whether or not these working papers still existed.

19. In relation to these requests I was satisfied that such documents are likely to have existed. I say this based on experience that generally forecasts of the kind set out in the spread sheets referred to are usually based on some form of information available to the party producing them or on the basis of assumptions or a combination of the two. Such spread sheets or similar analyses are not normally produced in a vacuum.

Accordingly on the balance of probabilities I was satisfied it was more likely than not that

such documents had existed. 20. I was also not satisfied that these documents had been considered by the plaintiffs in producing their affidavit of discovery. This was because it was not in dispute between the parties that the person with whom Mr Doyle principally dealt with was Mr Sam Marable, senior director of International Development for the plaintiffs, at the time the defendant entered into the franchise agreement. Yet neither the name 'Marable' nor Mr Marable's email address had been searched or referred to in the search terms listed by Ms Roby. Furthermore, her affidavit did not explain what systems, computers or databases were searched. It also did not analyse what records no longer existed because of any destruction policies operated by the plaintiffs. I did not therefore regard the affidavit as providing a full explanation to satisfy me that this category of documents asked for by the defendant had already been reviewed for discovery purposes or that they did not exist. 21. In relation to the relevance of these documents the view I reached was that the underlying assumptions upon which these spreadsheets were based were relevant. This is because they went to the plaintiffs' state of knowledge. Whether they might support the defendant's case or the plaintiffs' case, in particular whether any statements made were or were not accurate, does not matter. I was satisfied that the underlying assumptions could lead to a train of enquiry, supporting one or the other party's case concerning the plaintiffs' knowledge. To take an extreme example, if there were no assumptions upon which the statements were made and they had been simply plucked out of the air such a situation could be material to the defendant's allegation. Equally the assumptions might support the plaintiffs' arguments that any statements made were not misrepresentations but were accurate forecasts based on information then available to the plaintiffs. 22. The most difficult aspect of this part of the defendant's application concerned the breadth of these requests. In my judgment they went too far because the requests were for all financial information evidence supporting the details of the calculations and all the assumptions. The extent of the financial information that might be covered by these requests could be substantial if not vast. The requests therefore went too far in asking for effectively all information supporting the details of the calculations. What I however did not regard as oppressive was to order disclosure of the assumptions and estimates relied on in producing the spreadsheets and any financial information or evidence supporting such assumptions or estimates. In other words I required the plaintiffs to disclose the assumptions or materials relied upon the plaintiffs in producing the documents SD001, SD002 and SD006 disclosed by the plaintiffs and document 472 disclosed by the defendant. 23. As I was not satisfied with the affidavit of Rebecca Roby for the reasons set out in paragraph 20 I also required any affidavit of discovery to set out what steps were taken by the plaintiffs to preserve electronic documents from the date they were on notice of the defendant's counterclaim, the processes followed by the plaintiffs in providing such electronic discovery and what systems or devices had been searched. I also required the affidavit to explain the documentation retention policies operated by the plaintiffs and to identify what documents that were otherwise relevant no longer existed by reason of such policies. I made this order specifically because while I was satisfied that the requests referred to in

this part of the judgment were relevant and necessary for the case and it was not disproportionate to produce them, I accepted it was possible that such documents no longer existed, once they were looked for. If that was the position, given that this counterclaim was first identified in 2013, it was appropriate to require the plaintiffs to explain why documents no longer existed. In my judgment there would be a significant difference between documents no longer existing because they had been destroyed many years prior to the defendant's claim being raised and documents having been destroyed after a claim was notified. The latter scenario is one, if it arises, which would have to be grappled with by the Royal Court at trial in evaluating oral evidence put forward by a party which was not supported by documents as a result of their destruction after a claim had been notified. Requests 1.3 and 1.4 24. These requests can be also taken together and can be dealt with briefly. They concern communications between Mr Doyle and Mr Marable referred to above. The reason for these requests is firstly that an email address of Mr Doyle was not searched for by the plaintiffs and secondly neither Mr Marable's email account nor his name was searched. This is clear from the second affidavit of Rebecca Roby to which I have already referred. Given it was not in dispute that the main person that Mr Doyle dealt with was Mr Marable, and that the relevant emails in the name of Mr Marable had not been searched for, I was satisfied that it was appropriate to grant these requests. It was clear that communications between Mr Doyle and Mr Marable were relevant and on the balance of probabilities would exist. While the defendant should have disclosed any communications received by Mr Doyle from Mr Marable, the plaintiffs should also search for and disclose any such communications together with any other documents relevant to such communications internal to the plaintiffs concerning the Cayman franchise agreement or the related memorabilia lease. Such communications, assuming they still exist, will allow for an evaluation of what was being said between the parties compared with their state of knowledge. Contemporaneous written evidence of what parties have said to each other or recording their state of knowledge before a dispute has arisen is often significant evidence in the context of a subsequent dispute. For the same reason notes of any conversations taken by Mr Marable or internal communications following on from such communications in relation to the establishment of a franchise operation in Cayman should be disclosed. I was also satisfied that these requests were proportionate because they were limited to the period October 1998 and June 1999 i.e. the period of discussions leading up to execution of the franchise agreement. Request 1.5 25. This request relates to manuals referred to in the franchise agreement which pursuant to its terms were to be provided by the plaintiffs to the defendant. During the course of argument the plaintiffs indicated that these manuals would be made available to the defendant which was an offer that had already been made in related proceedings in the United States concerning a franchise operation in the Bahamas. Given this offer, I decided it was not necessary for this application by the defendant to be determined and therefore adjourned this request sine die . This was because it was not clear to me whether the relevant manuals still existed, why they were relevant and whether it was necessary for the plaintiffs to have to produce every manual or variation of a manual since 1999. The offer allowed the

defendant to review what manuals were being made available and to decide if it wished to rely on any such manuals or renew its request in whole or in part, having considered what the plaintiffs were offering voluntarily to make available. On any such application issues of relevance and necessity would have to be addressed. Requests 1.6 and 1.7 26. These requests can also be taken together. In relation to these requests during the course of argument it became clear that there were a number of businesses run using the Hard Rock name covering cafes, hotels, casinos and licensed and other retail premises. 27. As far as hotels, casinos and other licensed premises are concerned, I was not satisfied that financial information about these businesses was relevant to a dispute about a franchise agreement relating to the operation of a café/restaurant. In particular I was not satisfied that evidence of the performance of other types of businesses using the Hard Rock brand was relevant to whether or not the defendant was misled in respect of entering into a franchise agreement in relation to the operation of a Hard Rock café/restaurant in the Cayman Islands. Any request for financial information in respect of any of the Hard Rock operations was therefore refused as it failed to satisfy the test of relevance. The issue is the profitability of cafes/restaurants not the Hard Rock brand generally. In any event even if such information was relevant I was also not satisfied that it was necessary to require such information to be produced. The amount of material would be substantial. Any relevance would also be marginal as only limited comparisons could be made. 28. In relation to cafes/restaurant using the Hard Rock brand, it emerged in the course of the materials provided and submission that significant number of café/restaurants were run by the Hard Rock Group itself. The defendant argued that information about the financial performance of these cafes/restaurants was relevant to whether or not it had been misled or whether or not the plaintiffs had acted unreasonably in refusing to vary terms of the franchise agreement. 29. In respect of these records, I could see how the defendant might contend, by reference to the performance of other cafes and restaurants run by the Hard Rock Group itself, that performance of such cafes and restaurants might be relevant to the plaintiffs' knowledge of the profitability of the restaurant side of a business as distinct from the restaurant and merchandise sales combined. However I was not satisfied that I should order disclosure of this information. This was firstly because the defendant's claims concerned operation of a franchise agreement. Information in relation to other cafes and restaurants which were run by the Hard Rock Group itself was not comparing like with like. Such businesses did not have to pay royalties or licence fees. Their profitability was not therefore affected, unlike franchise agreements, by having to pay royalties to the Hard Rock Group. Even if some form of comparison can be made, in my view the relevance is marginal at best. However the request in any event fails the test of necessity. To require the plaintiffs to provide information on all cafes operated by the Hard Rock Group itself between 1999 and 2013 is oppressive. The number of cafes in operation by the Hard Rock group itself appeared to have ranged between 40 and over 100 during the period requested. To require up to 100 cafes, if not more, to produce information about their financial performance, even on an annual basis, goes too far and is burdensome, in particular where any comparison that can be made is not like for like

and is only of marginal relevance as I have set out above. In addition, to the extent that the defendant wishes to advance arguments either through expert evidence or by way of cross-examination, it already has material that has been disclosed or come into the defendant's possession which allows it to put such questions as it wishes to in relation to the profitability of cafés run by the Hard Rock Group and what that might mean in relation to the profitability of franchise operations. 30. While Advocate Garrood expressed concern that information was being sought to put it in the public domain to embarrass the plaintiffs, the fact that information might be sensitive or embarrassing is, as Advocate Sanders pointed out, not a reason to refuse to order specific discovery. Questions of confidentiality can be dealt with by ordering that such information is confidential, notwithstanding that an order for discovery has been made, subject to the discretion of the trial judge. The key test to decide whether or not disclosure is required is not one of confidentiality but relevance and necessity. In this case I was not satisfied that the information in respect of the cafes operated by the Hard Rock Group itself was relevant and came to the conclusion that any such disclosure would be oppressive and was not needed for the Royal Court to determine the defendant's claims and therefore was not necessary. The key issue was why the operation in the Cayman Islands was not profitable and whether this followed from either a misrepresentation or breach of an implied term. 31. My conclusion applied not just to the request for information in respect of all cafes, but also to the three specific units in San Juan, St Thomas and Key West. This was because while it would not be oppressive to produce such information, I was not satisfied of the relevance of such comparisons in respect of cafes that were run by the Hard Rock Group itself and were not operated under a franchise agreement. 32. However, in respect of the operation of other franchise agreements entered into by the Hard Rock Group, I reached a different view. It was clear from the plaintiffs' 2011 strategic plan, produced on discovery, that analysis of the performance of the franchise cafes by the plaintiffs/the Hard Rock group had taken place. The extent to which such franchise agreements were or were not profitable is relevant to the arguments between the parties unlike the performance of cafes operated by the Hard Rock Group itself. This information was relevant in particular to the defendant's assertion that the franchise operations of the plaintiffs were based on a fundamentally flawed model and this is why both the defendant's claim in dol should succeed and alternatively why the plaintiffs should have acceded to requests to vary a model it knew to be flawed. Accordingly, I ordered disclosure of annual accounting records of the franchise cafes from 1999 to 2013 recording annual profits whether by restaurant, sales of merchandise or both. 33. In respect of this request however, while I was satisfied that this information had not been searched for, by reference to my observations above concerning Ms Roby's affidavit, I gave liberty to apply to vary this order, if to provide all information potentially caught by the order would be unnecessary. This was because Advocate Garrood was not in a position to say how much material such an order might cover. Given my criticisms of the second affidavit of the plaintiffs setting out what searches it carried out and the lack of any other evidence setting out how much documentation this part of my order might cover, I considered it appropriate to allow the

plaintiffs liberty to revisit the third limb of the test set out in Vilsmeier i.e. is production of all the material necessary if the order I have made has the consequence of requiring disclosure of very significant or extensive quantities of material. I encouraged the parties to adopt a sensible approach should such an issue arise so that if the information ordered to be disclosed was found in one document or a few documents similar to the 2011 strategic plan, it would not be necessary to produce other documents which simply contained duplication of the information that was to be provided. 34. Finally, I should make it clear in relation to this order that I was satisfied that such records existed both by reference to the 2011 strategic plan to which I have already referred and the terms of the franchise agreement itself. Section 12B of the franchise agreement executed between the first plaintiff and the defendant required the defendant to produce annual audited financial statements as well as weekly and monthly reports. As it appears to be the plaintiffs' case that the franchise agreement entered into was a standard agreement, I reached the view that similar provisions would be likely to be found in other franchise agreements requiring financial information to be provided so that the plaintiffs would be in possession of the information I ordered to be produced. Indeed it would be surprising if such agreements did not contain some of the provisions because otherwise the plaintiffs would not be in a position to monitor the performance of the relevant franchisee and therefore what fees were due to the Hard Rock Group. Requests 1.8, 1.10 and 1.14 to 1.16 35. While I have dealt in part with request 1.8 in the preceding section insofar as information was sought about cafes operated by the Hard Rock Group itself, request 1.8 and the other requests referred to in this part of this judgment concern the financial performance of the plaintiffs themselves and what income they received from cafes and franchise agreements they operated and their own profitability. In respect of these requests, other than in respect of franchise agreements referred to above, I was not otherwise satisfied that details of income received by the plaintiffs or the profitability of the Hard Rock Group was relevant to the defendant's claims. The issue between the parties is whether the plaintiffs' model was flawed, whether the defendant was misled and whether the refusal to agree to variations requested was a breach of an implied term. What profits the Hard Rock Group may have made out of the operation of a franchise agreement, in my view is not relevant to these issues. In addition, to the extent the defendant wished to explore in cross-examination, (if not prevented from doing so by the trial judge), the profits being made by the Hard Rock Group compared with losses made by either the defendant or other franchise cafes, it already had sufficient material to do so. Further disclosure was not necessary to explore the comparative position of profits or losses made by the parties. 36. In refusing these requests, when giving my decision I made it clear that certain requests, in particular material covered by requests 1.15 and 1.16, might have to be disclosed in any event because of the discovery order I have made in respect of the profitability of franchise cafes. However it is for the plaintiffs and their Jersey advocates to review these documents to consider whether or not they are disclosable in light of the order for discovery made in respect of the annual profits of franchise cafes. Request 1.13 37. In respect of request 1.13 concerning best practice

evaluation reports, I was satisfied that these were relevant. This was because if such documents showed that the defendant was in general terms complying with the requirements of the plaintiffs in how to operate the franchise but were still making losses, this was evidence which could support the defendant's contention that the plaintiffs' model was structurally flawed. Such reports could also assist the plaintiffs if it turned out that the assessment of the defendant's practice indicated poor results which might be affecting profitability. Given that the plaintiffs have already disclosed a best practice evaluation dated September 2000 and one dated March 2010, I was satisfied that such documents were more likely than not to exist. I was also satisfied given the size of the documents produced, which were comparatively brief, it would not be oppressive for such documents to be produced. If these reports no longer exist, why this is the case will have to be explained to the level of detail referred to in paragraph 23 above. 38. Finally given that the plaintiffs were successful on some requests but unsuccessful on others the question of costs was left over until delivery of these detailed written reasons. Authorities
Hard Rock Ltd v HRCKY Ltd

[2016] JRC 129 . Hard Rock Ltd v HRCKY Ltd

[2013] JRC 244B . Hard Rock Ltd v HRCKY Ltd

[2015] JRC 117 . Vilsmeier v AI Airports International Limited and PI International Limited

[2014] JLR Note 26. Page Last Updated: 22 Sep 2016 BAILII: Copyright Policy | Disclaimers | Privacy Policy | Feedback | Donate to BAILII

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