

IN THE SUPREME COURT OF VICTORIA
AT MELBOURNE
COMMERCIAL COURT



S ECI 20

Case: S ECI 2018 01963

Filed on: 04/09/2020 03:51 PM

BETWEEN:

ALSEL GROUP PTY LTD (ACN 126 074 673)
(as trustee for the ALSEL GROUP TRUST)
AND OTHERS ACCORDING TO THE ATTACHED SCHEDULE

Plaintiffs

and

BUSINESS SERVICE BROKERS PTY LTD (ACN 069 049 994)
(trading as TELECHOICE)
AND OTHERS ACCORDING TO THE ATTACHED SCHEDULE

Defendants

DEFENCE

Date of Document: 4 September 2020	Solicitors Code: 104265
Filed on behalf of: the Defendants	DX: N/A
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To the plaintiffs' statement of claim dated 16 June 2020, the defendants say as follows:

Group Proceedings and Common Questions

1. They do not plead to paragraph 1 as no allegation is made against them.
2. As to paragraph 2, they:
 - (a) admit that the proceeding is commenced by the plaintiffs on their own behalf and in a representative capacity;
 - (b) say further that by reason of the matters alleged in paragraphs 56 to 60 below, the plaintiffs are not able to bring the proceeding on their own behalf, and therefore cannot bring the proceeding in a representative capacity;

- (c) say further that in respect of a number of the alleged group members, which are yet to be specifically identified, the defendants have entered into Deeds of Settlement or Deeds of Release, or have otherwise agreed releases with those group members, and accordingly no claim can be brought on behalf of those group members; and
 - (d) otherwise do not admit paragraph 2.
- 3. They do not admit paragraph 3.
- 4. They do not plead to paragraph 4 as no allegation is made against them.

Parties

- 5. They admit paragraph 5.
- 6. They admit paragraph 6.
- 7. They admit paragraph 7.
- 8. As to paragraph 8, they:
 - (a) admit sub-paragraph (a);
 - (b) as to sub-paragraph (b):
 - (i) say that from about 2001 until 31 March 2013, the first defendant was engaged in the business of operating a retail distribution network as a franchisor pursuant to agreements with franchisees to operate TeleChoice branded retail businesses, promoting and selling Optus telecommunications products and services; and
 - (ii) otherwise deny sub-paragraph (b);
 - (c) admit sub-paragraph (c); and
 - (d) admit sub-paragraph (d).
- 9. They admit paragraph 9.
- 10. They admit paragraph 10.

Terms of the 2007 Franchise Agreement and the 2009 Franchise Agreement

11. Subject to referring at trial to the full terms and effect of the 2007 Franchise Agreement and the 2009 Franchise Agreement, they admit paragraph 11.
12. As to paragraph 12, they:
 - (a) deny sub-paragraph (a);
 - (b) deny sub-paragraph (b); and
 - (c) say that sub-paragraph (c) is vague and embarrassing, and subject to be struck out, and under cover of that objection, they deny sub-paragraph (c).

The TeleChoice v Optus Litigation

13. They admit paragraph 13.
14. Subject to referring at trial to the full terms and effect of the SFASOC, they admit paragraph 14.
15. Subject to referring at trial to the full terms and effect of the SFASOC, they:
 - (a) say that the Prayer for Relief in the SFASOC does not distinguish between “primary” relief and other forms of relief; and
 - (b) otherwise admit paragraph 15.
16. Subject to referring at trial to the full terms and effect of the SFASOC, they admit paragraph 16.

The First and Second Plaintiff’s entitlement to commissions claimed by TeleChoice

17. As to paragraph 17, they:
 - (a) refer to and repeat paragraphs 11 and 12 above;
 - (b) say further that the allegation in paragraph 17 is embarrassing insofar as it refers to a “portion of the sums received by TeleChoice”, and is liable to be struck out;
 - (c) admit that in the event that TeleChoice recovers any sums from Optus in the TeleChoice v Optus Litigation in the nature of commission with respect to

which sum it would have had an obligation under the express terms of the 2007 Franchise Agreement or the 2009 Franchise Agreement to pay to the first plaintiff or the second plaintiff the Franchisee's percentage, then it will be obliged to account for that sum to them after deducting any costs and other expenses associated with the recovery of the commission sum from Optus and any sums due from the first and second plaintiffs to TeleChoice; and

(d) otherwise deny paragraph 17.

18. Insofar as it contains any allegation against them, they deny paragraph 18.

Unconscionable conduct

19. As to paragraph 19, they:

(a) admit that from 1 January 2011 insofar as the first defendant was and is engaged in the business described in paragraph 8 above, it was and is engaged in trade and commerce within the meaning of section 2(1) of the ACL; and

(b) otherwise deny paragraph 19.

20. As to paragraph 20, they:

(a) say that the paragraph does not particularise what conduct is said to be unconscionable, or how it is said to be unconscionable, and is embarrassing and liable to be struck out; and

(b) under cover of that objection, deny paragraph 20.

21. They deny paragraph 21.

22. They deny paragraph 22.

Fiduciary duties

23. As to paragraph 23, they:

(a) say that the paragraph is embarrassing as the words "by reason of the relationship" do not explain what matters give rise to the alleged fiduciary relationship, and is liable to be struck out; and

(b) under cover of that objection, deny paragraph 23.

24. Insofar as it contains any allegation against them, they deny paragraph 24.

First Defendant's Breaches of Contract

25. Subject to referring at trial to the full terms and effect of the 2007 Franchise Agreement and the 2009 Franchise Agreement, they admit paragraph 25.

First Defendant's breaches of 2007 Franchise Agreement

26. As to paragraph 26, the first defendant:

- (a) admits that on 16 August 2007, the first defendant granted to the first plaintiff a franchise and licence to operate and conduct the business at the Shop;
- (b) says further that:
 - (i) at the time of granting the first plaintiff the franchise and licence, the first defendant had not entered into the final dealer agreement with Optus; and
 - (ii) at the time the first defendant did enter into the final dealer agreement with Optus in around March and April 2008, it did not know that the agreement would be the final dealer agreement between the first defendant and Optus;
- (c) otherwise denies sub-paragraph (a);
- (d) denies sub-paragraph (b);
- (e) as to sub-paragraph (c):
 - (i) says that on about 1 April 2013, the first defendant commenced selling TeleChoice-branded telecommunications products and services under an agreement with Telstra Wholesale; and otherwise denies sub-paragraph (c);
- (f) as to sub-paragraph (d):
 - (i) refers to and repeats sub-paragraph (e) above;
 - (ii) denies any obligation to undertake such a review; and
 - (iii) otherwise denies sub-paragraph (d); and

- (g) as to sub-paragraph (e):
 - (i) denies that it owed any obligation to the first plaintiff in respect of the payment of the monthly rent, or any obligation in respect of informing the first plaintiff about the status of the Shop's rent; and
 - (ii) says further that the first defendant has satisfied all past and future obligations owed to the Landlord.

27. The first defendant denies paragraph 27.

First Defendant's breaches of 2009 Franchise Agreement

28. As to paragraph 28, the first defendant:

- (a) admits that on 7 October 2009, the first defendant granted to the second plaintiff a franchise and licence to operate and conduct the business at the Kiosk for a term that was longer than the term of its final dealer agreement with Optus;
- (b) says further that:

at the time the first defendant entered into the final dealer agreement with Optus in around March and April 2008, it did not know that the agreement would be the final dealer agreement between the first defendant and Optus;
- (c) otherwise denies sub-paragraph (a);
- (d) denies sub-paragraph (b);
- (e) as to sub-paragraph (c):
 - (i) admits that on about 1 April 2013, the first defendant commenced selling TeleChoice-branded telecommunications products and services under an agreement with Telstra Wholesale; and
 - (ii) otherwise denies sub-paragraph (c);
- (f) as to sub-paragraph (d), says that the allegation in that sub-paragraph is a duplicate of the allegation in paragraph 26(d), accordingly is not supported by its first particular, and refers to and repeats paragraphs 26(f) above; and
- (g) as to sub-paragraph (e):

- (i) denies that it owed any obligation to the second plaintiff in respect of the payment of the monthly rent, or any obligation in respect of informing the second plaintiff about the status of the Kiosk's rent; and
- (ii) says further that the first defendant has satisfied all past and future obligations owed to the Landlord.

29. The first defendant denies paragraph 29.

Misleading and Deceptive Conduct

30. The first defendant admits paragraph 30.

31. The first defendant admits paragraph 31.

The First Defendant's misleading conduct to the First Plaintiff

32. As to paragraph 32, the first defendant:

- (a) admits sub-paragraph (a) insofar as the 2007 Franchise Representation is alleged to be in writing, and otherwise denies sub-paragraph (a);
- (b) as to sub-paragraph (b), says:
 - (i) subject to relying on the full terms and effect of the 2007 Franchise Deed, it admits that clause 29(a) and (b) contain an option to renew;
 - (ii) it denies the 2007 Renewal Representation insofar as it is alleged to be oral; and
- (c) says further that insofar as the 2007 Franchise Representation and the 2007 Renewal Representation are alleged to be oral (which is denied), it relies on the "Entire Agreement" clause contained in clause 36 of the 2007 Franchise Agreement and says that by operation of that clause, the first defendant is not responsible for or bound by any oral statement made prior to the entry into the 2007 Franchise Agreement.

33. The first defendant denies paragraph 33.

34. As to paragraph 34, the first defendant:

- (a) admits that the 2007 Renewal Representation was with respect to future matters;
- (b) says further that the plaintiffs have not alleged that the first defendant did not have reasonable grounds for making the representation for the purposes of s 51A of the TPA or s 4(1) of the ACL; and
- (c) says further that the first defendant had reasonable grounds for making the 2007 Renewal Representation.

Particulars

At the time of making the Renewal Representation:

- (a) the first defendant expected that it would continue to operate the TeleChoice business whether pursuant to a dealer agreement with Telstra or Optus or some other telephone service provider until such time as it was purchased by Telstra or Optus or some other party; and
- (b) insofar as the negotiations between the first defendant and Telstra or Optus concerned the potential purchase of the first defendant's business by Telstra or Optus, the first defendant expected that the TeleChoice business would continue even if purchased by Telstra or Optus.

35. The first defendant denies paragraph 35.

36. The first defendant does not admit paragraph 36.

37. The first defendant denies paragraph 37.

38. As to paragraph 38, the first defendant:

- (a) refers to and repeats paragraph 26(g) above; and
- (b) otherwise denies paragraph 38.

39. The first defendant denies paragraph 39.

40. The first defendant does not admit paragraph 40.

41. The first defendant denies paragraph 41.

The First Defendant's misleading conduct to the Second Plaintiff

42. Subject to relying on the full terms and effect of the 2009 Franchise Deed, the first defendant admits paragraph 42.
43. The first defendant denies paragraph 43.
44. As to paragraph 44, the first defendant:
 - (a) admits that the 2009 Renewal Representation was with respect to future matters;
 - (b) says further that the plaintiffs have not alleged that the first defendant did not have reasonable grounds for making the representation for the purposes of s 51A of the TPA or s 4(1) of the ACL; and
 - (c) says further that the first defendant had reasonable grounds for making the 2009 Renewal Representation.

Particulars

At the time of making the 2009 Renewal Representation:

- (a) the first defendant expected that it would continue to operate the TeleChoice business whether pursuant to a dealer agreement Optus or some other telephone service provider until such time as it was purchased by Optus; and
 - (b) insofar as there had been negotiations between the first defendant and Optus concerning the purchase of the first defendant's business by Optus, the first defendant expected that the TeleChoice business would continue notwithstanding that purchase .
45. The first defendant denies paragraph 45.
46. The first defendant does not admit paragraph 46.
47. The first defendant denies paragraph 47.
48. As to paragraph 48, the first defendant:
 - (a) refers to and repeats paragraph 26(g) above; and
 - (b) otherwise denies paragraph 48.

- 49. The first defendant denies paragraph 49.
- 50. The first defendant does not admit paragraph 50.
- 51. The first defendant denies paragraph 51.

The Second Defendant and the Third Defendant – Knowingly Concerned / Involvement

- 52. The second and third defendants deny paragraph 52.

Third Plaintiff's claim – enforceability of personal guarantee

- 53. Insofar as it contains any allegation against them, they admit paragraph 53.
- 54. As to paragraph 54, they:
 - (a) say that the allegation is embarrassing and is liable to be struck out; and
 - (b) under cover of that objection, deny paragraph 54.
- 55. Insofar as it contains any allegation against them, they deny paragraph 55.

Estoppel

- 56. Each of the plaintiffs and the first defendant are parties to a proceeding in the County Court with file number CI-14-04847 (**County Court Proceeding**).

Particulars

The first defendant is the plaintiff in the County Court Proceeding, and the first, second and third plaintiffs are respectively the first, second and third defendants in the County Court Proceeding.

- 57. In the County Court Proceeding, the plaintiffs allege that:
 - (a) the first defendant failed to properly account to them for airtime commission which the first defendant received from Optus; and
 - (b) the first defendant failed to properly account to them for “monies [the first defendant] owes [the plaintiffs] pursuant to the terms of the various agreements”.

Particulars

The allegations are contained in paragraphs 37 and 38 of the plaintiffs' Amended Defence and Set Off dated 13 June 2017.

The allegation in sub-paragraph (b) is contained in paragraph 38 of the plaintiffs' Amended Defence and Set Off dated 13 June 2017.

58. On 22 January 2019, the County Court made orders by consent in the County Court Proceeding, inter alia, that:
- (a) the County Court Proceeding be dismissed with a right of reinstatement.
 - (b) the plaintiffs and the first defendant agree that the County Court Proceeding be reinstated in the following circumstances:
 - (i) the first defendant and the Optus entities enter into terms of settlement in respect of the proceeding S ECI 2017 0029 currently before the Supreme Court of Victoria (**Supreme Court Proceeding**);
 - (ii) the first defendant or the Optus entities file a notice of discontinuance in respect of the Supreme Court Proceeding;
 - (iii) if there is judgment in favour of either the first defendant or the Optus Entities in respect of the Supreme Court Proceeding; and
 - (iv) either party may reinstate the County Court Proceeding at any time, by leave of the County Court or with the consent of all parties.
59. None of the matters alleged in paragraph 58(b)(i) to (iv) have occurred.
60. In the premises, by operation of the principles in *Port of Melbourne Authority v Anshun Pty Ltd* (1981) 147 CLR 589, the plaintiffs are estopped from bringing the current proceeding.

Limitation of actions

61. The defendants say further that:
- (a) insofar as it is alleged that:
 - (i) the defendants engaged in unconscionable conduct in the manner alleged in paragraphs 19 to 22 of the Statement of Claim (which is denied); and

- (ii) damage occurred prior to 29 October 2012,
the claim is statute barred by operation of s 236 of the *Australian Consumer Law*;
- (b) insofar as it is alleged that:
 - (i) the defendants breached the 2007 Franchise Agreement or the 2009 Franchise Agreement in the manner alleged in paragraphs 25 to 29 of the Statement of Claim (which is denied); and
 - (ii) the breaches occurred prior to 29 October 2012,
the claim is statute barred by operation of s 5 of the *Limitation of Actions Act 1958* (Vic);
- (c) insofar as it is alleged that:
 - (i) the defendants engaged in misleading or deceptive conduct in the manner alleged in paragraphs 30 to 51 of the Statement of Claim (which is denied); and
 - (ii) the plaintiffs suffered loss or damage prior to 29 October 2012,
the claim is statute barred by operation of s 236 of the *Australian Consumer Law* and/or ss 82(2) and 87(1CA) of the *Trade Practices Act 1974* (Cth).

G L Schoff

M D Tehan

Dated: 4 September 2020



Telco7 Legal

Solicitors for the defendants

SCHEDULE OF PARTIES

ALSEL GROUP PTY LTD (ACN 126 074 673)

First Plaintiff

TELE WORLD GROUP PTY LTD (ACN 090 849 675)

Second Plaintiff

ALI SELEK

Third Plaintiff

and

BUSINESS SERVICE BROKERS PTY LTD

(ACN 069 049 994) TRADING AS TELECHOICE

First Defendant

and

EHAB ABDOU

Second Defendant

and

PAUL REEVES

Third Defendant