

Supreme Court  
New South Wales

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Case Name: Douglas v Mikhael & Ors

Medium Neutral Citation: [2023] NSWSC 979

Hearing Date(s): 5, 6, 7, 8 September, 13, 14 December 2022

Date of Orders: 18 August 2023

Decision Date: 18 August 2023

Jurisdiction: Equity

Before: Richmond J

Decision: Plaintiff's claim dismissed with costs.

Catchwords: CONTRACTS — oral contract — formation of contract

Cases Cited: Brambles Holdings Ltd v Bathurst City Council (2001) 53 NSWLR 153; [2001] NSWCA 61  
Briginshaw v Briginshaw (1938) 60 CLR 336; [1938] HCA 34  
Carr v Finance Corporation of Australia Ltd (No 1) (1981) 147 CLR 246  
Colyer Fehr Tallow Pty Ltd v KNZ Australia Pty Ltd [2011] NSWSC 457  
Effem Foods Pty Ltd v Lake Cumbeline Pty Ltd (1999) 161 ALR 599; [1999] HCA 15  
Et-China.com International Holdings Ltd v Cheung (2021) 388 ALR 128 [2021] NSWCA 24  
John Holland Pty Ltd v Kellogg Brown & Root Pty Ltd [2015] NSWSC 451  
Jones v Dunkel (1959) 101 CLR 298  
Macquarie Developments Pty Ltd v Forrester [2005] NSWSC 674  
Watson v Foxman (1995) 49 NSWLR 315

Category: Principal judgment

Parties: Joseph Douglas (Plaintiff)  
Fadi Mikhael, Mary Karborani, and FBM Enterprises Pty Ltd (Defendants)

Representation: Counsel:  
Mr K P Tang (Plaintiff)  
Ms O J Dinkha (Defendants)

Solicitors:  
Noss Lawyers (Plaintiff) (12-14 December 2022)  
Crumpton Lawyers (Defendants)

File Number(s): 2021/151712

Publication Restriction: Nil

## JUDGMENT

- 1 In these proceedings, the plaintiff claims damages and other relief for breach of an oral contract which he alleges was entered into by him with the first and second defendants in November 1999 and another oral contract which he alleges was entered into with all three defendants in May 2015. The central issue in the case is whether the plaintiff has established that the conversations on which he relies for the oral contracts occurred.
- 2 The plaintiff is Joseph Douglas (**Joseph**) whose name at birth was Yacoub Karborani. He changed his name twice, firstly to Abraham Jacobs in December 2005 and then in April 2007 to Joseph Douglas.
- 3 The first defendant is Fadi Mikhael (**Fadi**) and the second defendant is his wife, Mary Karborani (**Mary**). Joseph and Mary are siblings. The third defendant, FBM Enterprises Pty Ltd, is a company incorporated in New South Wales which is the trustee of a discretionary trust called The Mikhael's Trust (**Trust**). As mentioned below, the discretionary objects of the Trust include the first and second defendants, and also the plaintiff by reason of his familial relationship with the second defendant.
- 4 For convenience, and with no disrespect intended, I will refer to the plaintiff and the first and second defendants by their first names.

- 5 Mr Tang of counsel appeared for Joseph having been briefed only a short time before the hearing commenced, and Ms Dinkha of counsel appeared for the defendants.

### **Course of the hearing**

- 6 When the hearing commenced on 5 September 2022, Mr Tang, who had only recently come in to the matter, sought leave to amend the plaintiff's statement of claim to more clearly plead the plaintiff's case and the relief sought. I granted leave.
- 7 The matter had originally been set down for a hearing of 3 days. The cross-examination of the plaintiff's witnesses finished at the end of the third day. On the fourth day I adjourned the hearing because the first defendant, Fadi, had been admitted to hospital where he was being treated for an acute intracranial bleed and was in intensive care. This illness ultimately required a lengthy period of hospitalisation.
- 8 The hearing was adjourned (part heard) to 13 December 2022. On that day Fadi, Mary and Mr Hatoum were cross-examined. Before Mary was cross-examined, Ms Dinkha sought leave to rely upon a further affidavit of Mary which had only recently been sworn. This was opposed by Mr Tang. I upheld the objection due to the lateness of the affidavit but allowed the tender of the financial statements for the Trust for the 2015 to 2018 financial years (Ex 6) and a page of a bank statement for an account in the name of Dale & Waters showing a payment of \$300 (Ex 7). Ex 6 was in fact responsive to a Notice to Produce which the plaintiff had served on the defendants previously. Ex 7 is a document that I have not taken into account because of its lack of probative value.
- 9 The parties handed up written closing submissions on 14 December 2022 and made oral closing submissions, and at the end of that day judgment was reserved.
- 10 On 8 February 2023 the plaintiff sent an email to my Chambers making submissions about the evidence and seeking to file and serve a further affidavit. I have not taken into account this email or anything referred to in it because it was submitted without leave having been given by the Court and it

is clear that once the hearing has concluded the parties have no right to be heard further: *Carr v Finance Corporation of Australia Ltd* (No 1) (1981) 147 CLR 246 at 258.

**The parties pleaded cases.**

11 Joseph alleges that at a meeting in Sydney on 6 November 1999 he, Fadi and Mary, entered into an oral contract containing the following terms (**1999 Agreement**):

- (a) Joseph would pay \$75,000 to Fadi and Mary.
- (b) Fadi and Mary would apply the \$75,000 to acquire businesses to be managed under a franchise agreement from a franchisor.
- (c) The businesses would be held by a trustee on trust for Joseph, Fadi, Mary and others.
- (d) Fadi and Mary would themselves, or cause the trustee to, pay Joseph 50% of the profits generated by the businesses.
- (e) The trustee would hold 50% of the interest in each of the businesses on trust for Joseph.

12 Joseph alleges that in or around November 1999 pursuant to the terms of the above agreement, he paid \$75,000 to Fadi and Mary.

13 Joseph alleges that the Trust was established on or about 8 June 2000 with Fadi as trustee pursuant to the terms of the 1999 Agreement and that, in breach of the 1999 Agreement, the trustee of the Trust does not hold 50% of the business assets of the Trust on trust for Joseph.

14 Joseph contends, in the alternative, that in May 2015 the plaintiff and all three defendants entered into an oral contract containing the following terms (**2015 Agreement**):

- (a) The defendants would pay Joseph the sum of \$1,450,000 on a joint and several basis.
- (b) In consideration the payment of the sum of \$1,450,000 the first defendant (sic) would release the third defendant from his claim for his entitlement to be paid 50% of the profits of the Trust's business assets for the period up to 30 April 2015.
- (c) The third defendant would pay Joseph 50% of the profits derived from the Trust's business assets from May 2015 going forward.
- (d) The third defendant would not retain any of Joseph's share of the profits derived from the Trust's business assets and within the

trust, capitalise any such profits or deal with such profits other than by paying them to Joseph.

- (e) The defendants would provide Joseph with a full account of the Trust's business assets supported by financial records.

15 Joseph alleges that in breach of the terms of the 2015 Agreement and the terms of the Trust, he has not received from any of the defendants the sum of \$1,450,000, any part of the profits of the Trust's business assets (whether accrued since May 2015 or at all) or any account or financial records relating to the Trust's business assets.

16 The relief claimed by Joseph comprises:

- (a) A declaration that the trustee of the Trust holds the sum of \$75,000 and any capital and income derived therefrom on constructive trust for him.
- (b) An account be taken of the capital and income of the Trust with the matter being referred to a referee for the taking of that account, and that any amount owing to him on the taking of the account be paid to him.
- (c) That a receiver be appointed to the assets of the Trust.
- (d) Further and in the alternative, judgment for him in the sum of \$1,450,000 against the first and second defendants and an order that the third defendant pay to him 50% of the profit calculated from 1 May 2015.

17 The defendants deny the existence of the 1999 Agreement and the 2015 Agreement on the basis that the alleged conversations did not occur.

### **Relevant principles**

18 Joseph has the onus of establishing on the balance of probabilities that the two agreements for which he contends were entered into. The relevant principles in determining those questions were stated by Hammerschlag J (as his Honour then was) in *John Holland Pty Ltd v Kellogg Brown & Root Pty Ltd* [2015] NSWSC 451 as follows:

[93] A binding agreement is made when a reasonable person would believe that, based on their words and behaviour, the parties intended to contract. This is an objective test, which in most cases can be administered by determining whether there has been an offer by one party to be bound on certain terms accompanied by an unqualified acceptance of that offer communicated by the other party to the offeror. See generally: Paterson, Robertson, and Duke, *Principles of Contract Law*, (4th ed 2011, Thomson Reuters) at [1.15]

and [12.10]; J W Carter, *Contract Law in Australia*, (6th ed 2013, LexisNexis Butterworths) at [3.06].

[94] Where a party seeks to rely upon spoken words as a foundation for a cause of action, including a cause of action based on a contract, the conversation must be proved to the reasonable satisfaction of the court which means that the court must feel an actual persuasion of its occurrence or its existence. Moreover, in the case of contract, the court must be persuaded that any consensus reached was capable of forming a binding contract and was intended by the parties to be legally binding. In the absence of some reliable contemporaneous record or other satisfactory corroboration, a party may face serious difficulties of proof. Such reasonable satisfaction is not a state of mind that is obtained or established independently of the nature and consequences of the fact or facts to be proved. The seriousness of an allegation made, inherent unlikelihood of an occurrence of a given description, or the gravity of the consequences flowing from a particular finding are considerations which must affect the answer to the question of whether the issue has been proved to the reasonable satisfaction of the court. Reasonable satisfaction should not be produced by inexact proofs, indefinite testimony, or indirect inferences: see *Briginshaw v Briginshaw* (1938) 60 CLR 336 at 362; *Helton v Allen* (1940) 63 CLR 691 at 712; *Rejcek v McElroy* (1965) 112 CLR 517 at 521; *Watson v Foxman* (1995) 49 NSWLR 315 at 319.

[95] The sensation of feeling an actual persuasion, after a contest, that an event has happened or that something exists is one which is well known and recognised by experienced trial judges for what it is.

- 19 Where the existence and terms of an oral contract is in issue, consideration of the surrounding circumstances including the history of the relationship between the parties and their conduct prior to and at the time the alleged contract was entered into is permissible, as well as post-contractual conduct: *Colyer Fehr Tallow Pty Ltd v KNZ Australia Pty Ltd* [2011] NSWSC 457 at [47]–[50]; *Brambles Holdings Ltd v Bathurst City Council* (2001) 53 NSWLR 153; [2001] NSWCA 61 at [25].
- 20 When a plaintiff seeks to prove an oral contract relying on conversations occurring many years ago, it is necessary to bear in mind the well known observations of McLelland CJ in Eq regarding the fallibility of human memory in *Watson v Foxman* (1995) 49 NSWLR 315 at 319:

... human memory of what was said in a conversation is fallible for a variety of reasons, and ordinarily the degree of fallibility increases with the passage of time, particularly where disputes or litigation intervene, and the processes of memory are overlaid, often subconsciously, by perceptions or self-interest as well as conscious consideration of what should have been said or could have been said. All too often what is actually remembered is little more than an impression from which plausible details are then, again often subconsciously, constructed. All this is a matter of ordinary human experience.

- 21 It is for this reason that where the events (including conversations) relied upon took place many years ago, it is recognised that “the only safe course is to place primary emphasis on the objective factual surrounding material and the inherent commercial probabilities together with the documentation tendered in evidence”: *Effem Foods Pty Ltd v Lake Cumbeline Pty Ltd* (1999) 161 ALR 599; [1999] HCA 15 at [15] - [16]; *Et-China.com International Holdings Ltd v Cheung* (2021) 388 ALR 128; [2021] NSWCA 24 at [25]–[29] (and cases there cited).
- 22 In *Briginshaw v Briginshaw* (1938) 60 CLR 336; [1938] HCA 34, Dixon J emphasised that when the law requires the proof of any fact the Court must feel an actual persuasion of its occurrence or existence before it can be found, and “it cannot be found as a result of a mere mechanical comparison of probabilities independently of any belief in its reality” (at 361).
- 23 It follows that Joseph must prove to the reasonable satisfaction of the Court (in the sense of an actual persuasion) that the words he alleges were said in the alleged conversations in 1999 and 2015 were actually said, and that the alleged consensus resulting from those conversations was capable of forming a binding agreement and was intended by the parties to be legally binding. In determining whether that actual persuasion is achieved, the Court may have regard to the matters referred to above including the surrounding circumstances and post-contractual conduct of the parties.

### **Background facts**

- 24 Joseph and Mary were born in Amman, Jordan in 1971 and 1974 respectively. They lived with their parents, Ibrahim Karborani (**Ibrahim**) and Samia Karborani and sister, Meisa, in Jordan until January 1990 when the family migrated to Australia and settled in Perth.
- 25 In or around 1991, Ibrahim and Samia bought an ice cream business which operated in the weekend markets at Subiaco, Perth, for two days a week and later, in around 1993, a hamburger business in the same markets.
- 26 When the family moved in Perth in January 1990, Joseph completed his secondary school education and then attended Curtin University to study for a bachelor’s degree in Management and Finance but did so for one year only in

1992. It appears that after this he helped his parents in the businesses referred to in the previous paragraph and also worked part-time as a taxi driver in Perth from around 1993 to August 1998.

- 27 Mary completed her secondary school education in 1991 and then undertook a bachelor's degree in Electrical and Electronics Engineering at the University of Western Australia, graduating in 1996. She subsequently graduated with a Masters of Business Administration degree from the University of Western Australia in 2003. She has been employed by a number of companies including Unisys, KPMG Australia, CSBP Fertilisers, and Chevron in the period up to July 2008. From that time she and Fadi have owned and operated a business known as Dale & Waters, an online clothing business.
- 28 Fadi was born in Beirut, Lebanon in 1971 and he and his parents migrated to Australia in 1986. After completing his secondary school education in 1988, Fadi attended the University of New South Wales and graduated with a Bachelor of Science degree in 1993. He initially worked in the transport industry and then in late 1995 he commenced working for CityWide Clothing Alterations Pty Ltd (subsequently called Looksmart Alterations Pty Ltd) (**CityWide**) in Sydney. This was a company owned and controlled by Mr Abraham Hatoum (**Mr Hatoum**) which he established in 1994. Fadi and Mr Hatoum had met at the University of New South Wales when they were students and became friends. Fadi was employed with CityWide as Operations Manager from 1995 until mid 2000 and then from mid 2000 to 2017 he established, operated and sold franchised stores under the CityWide (and later Looksmart) branding in Perth. From 2011 to 2019 Fadi also operated an online furniture business known as Bella Furniture until that business ceased to operate, and from 2008 until the present time, he has operated the Dale & Waters business with his wife as noted above.
- 29 Fadi and Mary met in early 1995, became engaged in December 1995 and were married in January 1997. In late 1996, they purchased a unit in Rockdale, Sydney for \$180,000 which they subsequently sold in early 2000 for \$260,000 before moving to Perth.



- 30 From about 1997, when the CityWide business had grown to four stores in Sydney, Mr Hatoum began to explore new sites for the business outside Sydney, including in other States. Mr Hatoum had a vision of growing the business significantly by way of a franchise model that was reasonably priced and could be operated by “mum and dad” owners and migrant tailors. Around this time he attended seminars on franchising and having decided that franchising was the appropriate way to implement the expansion of the business he engaged lawyers with experience in franchising to prepare the necessary documentation. The franchise model was very successful and there are now more than 120 stores across Australia and New Zealand.
- 31 The first two franchised stores in Perth were located at Karinyup and Carousel and were initially established as company-owned stores in 1999. At that time, CityWide had around 13 stores, including stores in Brisbane and Melbourne.
- 32 In late 1997 or early 1998, Fadi had suggested to Mary’s parents that they should consider buying one or two franchised stores to be established by CityWide in Perth. He did so because Ibrahim had previously said to Fadi that he and his wife were considering selling their two stalls in the Subiaco weekend markets as they were only operating two days a week. Ibrahim and his wife were also interested in this as they saw it as providing a possible career path for Joseph.
- 33 From around August 1998 until April 1999, Joseph lived with Fadi and Mary at their Rockdale unit. Fadi’s evidence is that during the first two weeks of this period Fadi tried to teach Joseph the Looksmart business but says that this was unsuccessful because Joseph had little or no administration or computer skills, no business sense or acumen, and no interest in learning the business or developing the limited skill set he possessed. Fadi’s evidence is that as a result, after a few weeks the training ceased and Joseph started working as a courier driver for the CityWide business, delivering clothes from the various stores to the main store in the Gowings Building where the alteration work was performed. This evidence is corroborated by Mr Hatoum. Joseph disputes this and says that throughout the period from August 1998 to April 1999 he was being trained in the CityWide business. However, Joseph’s explanation of his

role is contradicted by the evidence of Fadi (the operations manager of the business) and Mr Hatoum (the ultimate owner of the business), and I prefer their evidence to that of Joseph on this aspect.

- 34 From around April 1999 to 2000, Joseph lived at his parents' home in Parkwood, Perth during which time he mainly worked as a taxi driver. From 2000 to 2003 Joseph lived in Sydney and mainly worked as a taxi driver in his own business. From 2003 to 2005 Joseph lived in the United Arab Emirates. When Joseph returned to Australia in 2005 he and his wife Christine lived for around 6 months with Mary and Fadi in Perth. After Joseph ceased living with Mary and Fadi in Perth in late 2005, Joseph lived and worked in Sydney until 11 August 2015 when he went to prison where he remained until his discharge on 10 May 2019. Fadi's evidence is that he had no contact with Joseph after 2005 and Mary's evidence is that she had little or no contact with Joseph after that time. I accept this evidence.
- 35 In early 2000, Fadi and Mary decided to relocate to Perth to live and acquired the first two CityWide franchised businesses at Karrinyup and Carousel from CityWide. Before these acquisitions occurred, Fadi established the Trust on 8 June 2000. He was the initial trustee until he was replaced by the third defendant as trustee by a deed dated 1 November 2009. The Trust was established, on advice from Fadi's accountant, to be the vehicle to own and operate the 2 franchised stores which he acquired from CityWide. Fadi developed a model whereby he would locate a site, take a lease, fit out the new site and then operate it as a CityWide franchisee until it was ready to be sold to a new franchisee. Over the period from 2000 to 2017, Fadi had established approximately 23 franchised stores in Perth, which had all been sold by 2017 when he exited the Looksmart business. The Trust was used as the vehicle to own and operate these stores.
- 36 On 29 March 2019, Mr Elias Tabchouri of Macquarie Lawyers sent a letter to Fadi and Mary which included a demand for payment of \$1,450,000 plus interest of \$306,247.94 and threatened legal proceedings if the payment was not made within 14 days. The letter stated relevantly:

We refer to the above matter and confirm we are the instructed legal representatives of Yacoub Karborani known as Joseph Douglas.

We are instructed that, you and our client were in partnership running a franchise business called "City Wide Alterations" in Perth and Western Australia. In our (sic) about 6 November 1999, our client entered into a contract with you to purchase the abovementioned business on the basis that the profits and costs would split on 50/50 basis.

Our client instructs that, during the period that he was in partnership with you, that you knowingly withheld all the profit due to our client in a family trust for the purpose of growing the business (**Family Trust**).

Our client instructs that he has been unsuccessful in his attempts to contact you in order to finalise his partnership with you.

We are instructed that our client requires the full debt owing to our client to be paid immediately. In this regard, as of 01 July 2015, the full debt owing to our client was \$1,450,000. This amount does not include his franchise ownership share, interest and legal fees.

Please note, interest continue to accrue until date of payment.

### **Promise**

We are instructed that, you have been promising our client for long time to make the above payment and simply doing nothing. Our client is extremely disappointed with your conduct, given the assistance and guidance he has provided to you in the area of business management for years.

Our client has suffered and continues to suffer financial losses and our client is intending to recover any loss from you.

- 37 It is not in dispute that this was the first time any written demand was made to the defendants (T143). This was followed up by a further letter of demand dated 1 May 2019. It may be noted that no reference is made in the letter of 29 March 2019 (or the 1 May 2019 letter) to any agreement made in May 2015 - the focus is entirely on an alleged agreement made on 6 November 1999.

### **The plaintiff's evidence**

- 38 Joseph gave evidence by 4 affidavits and was cross-examined. In addition, evidence was given in support of his case by Mr Rimon Mansour by 3 affidavits and he was cross-examined. I set out below the relevant parts of their evidence concerning the coming into existence of the 1999 Agreement and the 2015 Agreement.

#### ***(a) Joseph's evidence***

- 39 In Joseph's affidavit of 12 October 2020, he said the following regarding the alleged meeting on 6 November 1999 and the events leading up to it:

10. On August 1998, I came to Sydney from Perth ready to spend one year training with [the third defendant], and on the 28th of August 1998 I met Hatoum again at [the third defendant's] Headquarters which was located at the

Gowings Building in Sydney CBD opposite the QVB Building. I recall having a conversation with Hatoum with words to the following effect:

Me: "I am here and ready to train to become the franchisee of [the third defendant], for Perth and Western Australia."

Hatoum: "Before you start training, we will make a verbal contract now. How about this? You pay me \$150,000.00 to purchase the first two shops in Western Australia that operate under a franchise from (the third defendant). You pay me a franchise fee for operating the shops under the franchise. You keep the profits."

Me: "Okay. I'll use the profits to expand the business and find more shop locations and open up more franchise shops. How much is the franchise fee?"

Hatoum: "We'll calculate it from the turnover from the shops. You'll also have to do a year of training at our city headquarters so that you are able to grow and expand the business."

Me: "I accept your offer. This is a done deal. "

12. After that we shook hands and from that date on, I started training with (the third defendant] at their headquarters which was located at the Gowings Building in Sydney CBD opposite the QVB Building.

13. On or about August 1999, I finished training with [the third defendant]. I waited for Hatoum to complete negotiating with the two biggest shopping centres in Perth, Western Australia to open the first two shops.

14. On or around the end of October 1999, Mary contacted me, I recall having a conversation with Mary with words to the following effect:

Mary: "I have a surprise for you."

Me: "What"

Mary: "You are going to become an uncle for the first time in your life; I am pregnant with my first born."

Me: "Wow, that's great. I am extremely happy and I regard Fadi as my brother as I don't have any brothers. I feel like this baby is mine. I am going to be the Godfather of this baby."

Mary: "Yes for sure, you will be the Godfather of our firstborn, Fadi and I will be very happy with that.

Me: "Okay, all good."

Mary: "I have had enough of the fast and congested life in Sydney, and I want to move to Perth with Fadi, but he does not want to leave his parents because he does not want to leave his job here in Sydney, what is he going to do in Perth?"

Me: "Okay, do you need any help sister."

Mary: "Yes I do, I may be able to convince Fadi to leave Sydney and move to Perth if we can go halves with you on owning the business of franchise of [the third defendant] in Western Australia, that way if we move to Perth, my husband Fadi would have a Job."

Me: "You know how much I love you and your husband. Now that you are pregnant with your first born and I am going to be an uncle for the first time

you know I would do anything for you to be happy; whatever you want sister, I accept to go halves with you and Fadi on owning the business of the franchise of [the third defendant] in Western Australia."

Mary: "Okay, thank you brother, I am so happy now."

Me: "Okay, I made a deal with Hatoum and he wants \$150,000.00, I have \$45,000.00 saved up with my parents from driving taxis. I'll give you the \$45,000.00 that I've deposited with my parents and I'll borrow another \$30,000 from my cousin Rimon Mansour (Rimon). I'll give you \$75,000.00 in total."

Mary: "Okay, come over to Sydney next Saturday [6th of November] and we will all sit down and talk about it, and bring with you the \$30,000 that you are going to borrow from Rimon."

Me: "Okay, I will see you next Saturday [6th of November] and I will bring the \$30,000 and Rimon with me, so he can be there as a witness."

Mary: "Okay."

15. On the 6th of November 1999 Rimon and I sat with the Fadi and Mary at their place in Rockdale. Rimon brought the \$30,000 with him. While we were there; I had some discussions with Fadi and Mary about the franchise deal that Hatoum made with me. I had a conversation with Fadi and Mary with words to the following effect:

Fadi: "Mary and I want to go halves with you on owning the business franchise for [the third defendant] in Western Australia, because Mary your sister wants to move to Perth she had enough of Sydney. Mary told me that she talked to you last week and you agreed. Hatoum wants \$150,000.00 for the first two shops in Perth. Pay us \$75,000.00 and we'll put together another \$75,000.00. We'll buy the franchise together and share the profits."

Me: "Okay, you and Mary owe my parents \$45,000.00 that they lent to you for wedding expenses. I have \$45,000.00 saved up with my parents from driving taxis. I'll give you the \$45,000.00 that I've deposited with my parents so you can pay back my parents for the wedding expenses and I'll borrow another \$30,000 from my cousin Rimon Mansour. I'll give you \$75,000.00."

Fadi: "Okay. Mary and I accept. "

Me: "I want to have a 50% share in the first franchise shops for [the third defendant] in Western Australia, and 50% share in all the shops expanded from the profits of the first two shops In Perth and Western Australia for [the third defendant] and you and Mary will complete the negotiations with Hatoum so that you can finalise the purchase of the first franchised shops."

Fadi: "Okay. Mary and I accept and we will set up a trust so that we can own and run the franchise and use all the profits for expanding the business and acquiring assets. We will do the day to day running of the business. And your 50% share of ownership of all the shops In Western Australia, and the profits generated will be guaranteed, and you can ask for it anytime you like."

Me: "I'm okay with you using any type of company or trust to set this up. But you'll need to tell me what's happening with the company."

Fadi: "Of course."

Me: "Okay I accept, this is a done deal"

16. At this meeting I took the \$30,000.00 cash from Rimon and gave Mary the \$30,000.00 in cash. Mary took this money to her room. She did not give me a receipt and I did not ask for one.

17. After that we all hugged and shook hands and I left with Rimon to go out and eat.

18. I did not arrange for lawyers to reduce what was discussed and agreed upon to writing as Mary and Fadi were my only family and I trusted them.

40 Paragraphs 15 – 17 of this affidavit are exactly the same as paragraphs 11 – 13 of Mr Mansour's affidavit of 19 March 2021 set out at [46] below.

41 In Joseph's affidavit of 12 October 2020 he gives the following evidence regarding the alleged agreement made in May 2015:

29. In May 2015, I had a further conversation with Mary and Fadi with words to the following effect:

Me: "Can you give me my 50% share please? I need to purchase property for myself and a nice car so I can live comfortably with my children. Otherwise, you leave me with no choice, but to take legal action."

Mary: "Okay. The business of the franchise is in a very comfortable financial position. How about we give you \$950,000.00 so you can purchase property for yourself, same as what we purchased our house in the suburb of Rossmoyne, Perth. We'll also give you \$300,000.00 to be deposited at a bank account of your choice and another \$200,000.00 so you can buy yourself car or cars. And we'll start paying you a 50% share of the profits from the franchise and all the other assets acquired on a monthly basis. And you can have access to all the paperwork. We'll also put whatever we agreed upon in 1999 to writing."

Me: "Okay. Pay me then."

Mary: "We can't give it to you now. About a month ago, we just sent a lot of money to China to buy stock for the Dale and Waters franchise we purchased. We have clothing coming in and then we have to sell it so we won't be able to finalise payment until October or November this year. In the meantime, we can give you say \$8,000.00 to \$10,000.00 which we can pay you, say, \$1,500.00 to \$2,000.00 in cash each week for the next four weeks."

Me: "I don't like this. I want it transferred to one of my bank accounts so I can keep track."

Mary: "That's fine but you need to give us a receipt."

Me: "Why are you asking me for receipts?"

Mary: "So we can deduct it for tax purposes."

Me: "Okay."

Mary: "We will keep sending you money about say \$800.00 a week to your bank account until we sell the stock for the Dale and Waters franchise."

Me: "Okay. I'll give you one last chance."

30. I received \$2,000.00 in the first week after this conversation and then \$1,500.00 the following weeks. After that, I received \$800.00 every week. I did not know why Mary and Fadi chose to pay \$800.00 every week; they never gave me an explanation.

31. I gave Fadi and Mary two receipts and then I had a conversation with Mary with words to the following effect:

Me: "I am not giving any more receipts until you show me the paperwork, all the paperwork on how the business is going. I need all the paperwork sent to my accountant."

Mary: "Don't worry we do not need receipts, don't send us anymore receipts, we will keep paying you the money, until we settle what we agreed on."

32. On or about end of July 2015, I called Mary about whether the stock for the Dale and Waters franchise had been sold. I had a further conversation with Mary and Fadi with words to the following effect:

Me: "Did you sell the stock? When will you pay me the money we agreed on? When will you start paying me my 50% share of the profits? When can I look at the paperwork for the business and all the other assets acquired?"

Mary: "Soon, hopefully by October or November 2015 at the latest. Don't worry, the \$800 will keep on coming to your account until the day we pay you the money we agreed on and start paying you your 50% share of the profits, and show you all paperwork, don't worry."

- 42 Paragraph 31 of this affidavit refers to two documents which are headed "payment receipt" which are signed by Joseph, one dated 5 June 2015 for \$1,500 and another dated 9 June 2015 for \$2,000. However, there is no evidence that they were sent to any of the defendants and Fadi and Mary deny having received them.
- 43 Paragraphs 29, 31 and 32 of this affidavit correspond exactly with paragraphs 22 – 24 of Mr Mansour's affidavit set out at [47] below except that the opening words of paragraph 22 of Mr Mansour's affidavit refer to Mr Mansour being present while Joseph spoke to Mary with the telephone on loudspeaker, which is a matter not mentioned in Joseph's account in his affidavit.
- 44 In addition to the correspondence between the key paragraphs mentioned in [40] and [43] above, there is a close correlation between paragraphs 14, 19, 24, 25, 27 and 28 of Joseph's affidavit of 12 October 2020 and similar paragraphs in Mr Mansour's affidavit of 19 March 2021.
- 45 Joseph gave evidence in cross-examination that he typed his affidavit of 12 October 2020 himself and then sent it to his solicitor who made some "grammatical modifications" and then sent it back to him for signature (T160,

161 and 163). Joseph said that he did not send his affidavit to Mr Mansour before he prepared his affidavit of 19 March 2021 and had no involvement in the preparation of that affidavit (T161-162). I take this matter up again below.

*(b) Mr Mansour's evidence*

46 Mr Mansour gave the following evidence in his affidavit of 19 March 2021 regarding the alleged meeting on 6 November 1999:

11. On the 6th of November 1999 Joseph and I sat with Fadi and Mary at their place in Rockdale. I brought the \$30,000 with me to Fadi and Mary's house. While we were there; Joseph had some discussions with Fadi and Mary about the franchise deal that Hatoum made with him. Joseph had a conversation with Fadi and Mary with words to the following effect:

Fadi: "Mary and I want to go halves with you on owning the business franchise for [the third defendant] in Western Australia, because Mary your sister wants to move to Perth she had enough of Sydney. Mary told me that she talked to you last week and you agreed. Hatoum wants \$150,000.00 for the first two shops in Perth. Pay us \$75,000.00 and we'll put together another \$75,000.00. We'll buy the franchise together and share the profits."

Joseph: "Okay, you and Mary owe my parents \$45,000.00 that they lent to you for wedding expenses. I have \$45,000.00 saved up with my parents from driving taxis. I'll give you the \$45,000.00 that I've deposited with my parents so you can pay back my parents for the wedding expenses, and I'll borrow another \$30,000 from my cousin Rimon Mansour (Rimon). I'll give you \$75,000.00."

Fadi: "Okay. Mary and I accept."

Joseph: "I want to have a 50% share in the first franchise shops for [the third defendant] in Western Australia, and 50% share in all the shops expanded from the profits of the first two shops in Perth and Western Australia for [the third defendant]. That includes 50% share of all the assets acquired from the profits of the franchise of the business, whatever those assets are, property, cash at the bank and stock from the share market. Also, I want to be able to ask for my 50% share of the total assets acquired including all the shops expanded and acquired and any other assets acquired after the first two shops anytime I want. And you and Mary will complete the negotiations with Hatoum so that you can finalise the purchase of the first franchised shops."

Fadi: "Okay. Mary and I accept and we will set up a trust so that we can own and run the franchise and use all the profits for expanding the business and acquiring assets. We will do the day to day running of the business, And your 50% share of ownership of all the shops in Western Australia, and all the other assets acquired including property, cash at the bank and stock from the share market from the profits generated will be guaranteed, and you can ask for it anytime you like."

Joseph: "I'm okay with you using any type of company or trust to set this up. But you'll need to tell me what's happening with the company."

Fadi: "Of course."

Joseph: "Okay I accept this is a done deal"



Me: "Congratulations, I am happy for you."

12. While we were at the meeting, at Fadi and Mary's house Joseph took the \$30,000.00 in cash from me and he gave the \$30,000.00 in cash to Mary. Mary took this money to her room. She did not give Joseph a receipt and Joseph did not ask for one.

13. After that we all hugged and shook hands and I left with Joseph to go out and eat out.

14. After the meeting, Joseph and I agreed on a repayment plan for the \$30,000.00 and paid back the \$30,000.00 he borrowed bit by bit over time. By about October 2002, Joseph had paid me the \$30,000.00 he had borrowed from me in full.

- 47 In his affidavit of 19 March 2021, Mr Mansour gave the following evidence regarding the alleged conversation between Joseph and Mary in May 2015:

22. On or around May 2015, I was sitting next to Joseph when he had a conversation with Fadi and Mary over the telephone. The telephone was on loud speaker. I recall the conversation between them with words to the following effect:

Joseph: "Can you give me my 50% share please? I need to purchase property for myself and a nice car so I can live comfortably with my children. Otherwise, you leave me with no choice, but to take legal action."

Mary: "Okay. The business of the franchise is in a very comfortable financial position. How about we give you \$950,000.00 so you can purchase property for yourself, same as what we purchased our house in the suburb of Rossmoyne, Perth. We'll also give you \$300,000.00 to be deposited at a bank account of your choice and another \$200,000.00 so you can buy yourself car or cars. And we'll start paying you a 50% share of the profits from the franchise and all the other assets acquired on a monthly basis. And you can have access to all the paperwork. We'll also put whatever we agreed upon in 1999 to writing."

Joseph: "Okay. Pay me then."

Mary: "We can't give it to you now. About a month ago, we just sent a lot of money to China to buy stock for the Dale and Waters franchise we purchased. We have clothing coming in and then we have to sell it so we won't be able to finalise payment until October or November this year. In the meantime, we can give you say \$8,000.00 to \$10,000.00 which we can pay you, say, \$1,500.00 to \$2,000.00 in cash each week for the next four weeks."

Joseph: "I don't like this. I want it transferred to one of my bank accounts so I can keep track."

Mary: "That's fine but you need to give us a receipt."

Joseph: "Why are you asking me for receipts?"

Mary: "So we can deduct it for tax purposes."

Joseph: "Okay."

Mary: "We will keep sending you money about say \$800.00 a week to your bank account until we sell the stock for the Dale and Waters franchise."

Joseph: "Okay. I'll give you one last chance."

23. At some point in time, I was sitting next to Joseph when he had another conversation on the phone on loudspeaker. I recall a conversation with words to the following effect:

Joseph: "I am not giving any more receipts until you show me all the paperwork on how the business is going. And I need all the paperwork sent to my accountant."

Mary: "Don't worry we do not need receipts, don't send us anymore receipts, we will keep paying you the money, until we settle what we agreed on."

24. On or about end of July 2015, I had a conversation with Joseph with words to the following effect:

Joseph: "I asked Mary and Fadi, "Did you sell the stock? When will you pay me the money we agreed on? When will you start paying me my 50% share of the profits? When can I look at the paperwork for the business and all the other assets acquired?""

Me: "Okay, and what did they say."

Joseph: "They said soon, hopefully by October or November 2015 at the latest. They said, "Don't worry, the \$800 will keep on coming to your account until the day we pay you the money we agreed on and start paying you your 50% share of the profits on a monthly basis, and show you all paperwork, don't worry."

- 48 I have noted at [40], [43] and [44] above the correspondence between the key paragraphs of Joseph's affidavit of 12 October 2020 and Mr Mansour's affidavit of 19 March 2021.
- 49 Joseph's affidavit of 12 October 2020 and Mr Mansour's affidavit of 19 March 2021 were both witnessed by the same solicitor. This was not the same solicitor who represented Joseph during the hearing.
- 50 Mr Mansour said in cross-examination that he typed his affidavit of 19 March 2021 himself based on his own independent recollection of events and then sent it to Joseph's solicitor who made only minor grammatical spelling corrections to it before Mr Mansour signed it (T200, 209). He also said in cross-examination that in preparing the draft he had regard to a handwritten note of the meeting on 6 November 1999, which was the first time the existence of such a note had been mentioned (T211). A call was made for the production of the note, but none was produced. Mr Mansour also said that he had kept a record on his mobile phone at the time of the telephone conversation in May 2015 of the numbers referred to in paragraph 22 of his affidavit, but no longer had that mobile phone.

51 Mr Mansour said in cross-examination that he did not read Joseph's affidavit of 12 October 2020 before he made his affidavit of 19 March 2021 and that he had not seen that affidavit before giving evidence at the hearing (T207). However, Mr Mansour could provide no explanation for why there was such a close correspondence between the paragraphs of his affidavit set out above and the corresponding paragraphs of Joseph's affidavit of 12 October 2020.

52 In *Macquarie Developments Pty Ltd v Forrester* [2005] NSWSC 674 Palmer J said:

[89] ... it is totally destructive of the utility of evidence by affidavit if a solicitor or anyone else attempts to express a witness' evidence in words that are not truly and literally his or her own.

[90] Save in the case of proving formal or non-contentious matters, affidavit evidence of a witness which is in the same words as affidavit evidence of another witness is highly suggestive either of collusion between the witnesses or that the person drafting the affidavit has not used the actual words of one or both of the deponents. Both possibilities seriously prejudice the value of the evidence and Counsel usually attacks the credit of such witnesses, with good reason.

[91] Where the identity of evidence is due to collusion, the devaluation of the evidence is justified but where, as in the present case, the identity of evidence is due entirely to a mistake on the part of a legal adviser, a witness' credit and a party's case may be unjustly damaged.

53 In *Macquarie Developments* at [87], the correspondence between the evidence of two witnesses had been shown by the evidence of the solicitor of the party who called them to be the result of that solicitor "cutting and pasting" parts of an affidavit of one witness when preparing the affidavit of the other. In those circumstances, the correspondence of the evidence did not suggest collusion or collaboration between the witnesses.

54 However, in the present case, while the same solicitor prepared the final version of each affidavit, both Joseph and Mr Mansour were insistent in cross-examination that they each typed their own affidavits and that the solicitor merely revised their drafts to correct grammatical errors.

55 I infer from this evidence that there are only two likely alternative explanations for the similarity in the accounts given by Joseph and Mr Mansour of the alleged meeting on 6 November 1999 and the alleged conversation in May 2015. The first is that Joseph sent his 12 October 2020 affidavit to Mr Mansour

before he prepared his 19 March 2021 affidavit (in which case both Joseph and Mr Mansour gave untruthful evidence). The second is that Joseph's solicitor prepared Mr Mansour's 19 March 2021 affidavit and "copied and pasted" sections of Joseph's 12 October 2020 affidavit in that process, or sent that affidavit to Mr Mansour and he did so (in which case Mr Mansour but not Joseph gave untruthful evidence). Either way, the correspondence between Mr Mansour's affidavit and the corresponding parts of Joseph's affidavit and his unsatisfactory evidence in cross-examination regarding the alleged meeting and conversation, undermines entirely Mr Mansour's evidence in the proceedings and I reject it.

### **Defendants' evidence**

- 56 The first and second defendants each gave evidence by one affidavit and were cross-examined. Mr Hatoum also gave evidence by one affidavit and was cross-examined.

#### **(a) Fadi's evidence**

- 57 Fadi gave evidence in his affidavit that he never had any discussions with Joseph in November 1999 or at any other time about a business arrangement involving CityWide Alterations or Look Smart. He denies that the alleged meeting on 6 November 1999 occurred and denies receiving the amounts of \$30,000 or \$45,000, as alleged by Joseph in November 1999 or at any other time. He also denies ever meeting Mr Mansour.
- 58 Fadi also gave evidence that at the time Joseph alleges he entered into the 2015 Agreement with Fadi and Mary, Fadi and Mary's total assets were between \$1 million to \$1.2 million and so if Mary had agreed to pay the amount of \$1,450,000 to Joseph, they would have had to sell their family home as well as borrowing around \$400,000 with no collateral to give as security to the lender.

#### **(b) Mary's evidence**

- 59 Mary gave evidence that she never had any conversation with Joseph about going into business with him in franchises to be established by CityWide Alterations in Perth or in any other business. She denied attending a meeting with Joseph on 6 November 1999 in her unit (or at any other time or place) on

that topic or receiving \$30,000 in cash from him. She also gave evidence that she was not aware of having a cousin or any other family relation named Rimon Mansour and denies ever meeting him.

- 60 In relation to the allegation that Joseph makes about conversations leading to the 2015 Agreement, Mary denied having the conversations with Joseph referred to in paragraphs 29, 31 and 32 of Joseph's 12 October 2020 affidavit, and gave the following evidence about her dealings with Joseph around this time:

50. In or about late May or early June 2015, I received a call on my mobile phone from the Plaintiff and we had a conversation in words to the following effect:

Plaintiff: "I need to borrow some money to help Christine buy an accessories business".

Me: "How much do you need?"

Plaintiff: "Only \$10,000 and it will be paid back from the business profits"

Me: "I will speak to Fadi but we won't be able to give you that much and it won't be in a lump sum, it will have to be over a few payments".

Plaintiff: "Please sister, I need your help".

Me: "I will speak to Fadi and we will lend you what we can".

51. I spoke with Fadi later that same day and we had a conversation in words to the following effect

Me: Yacoub called me. He wants to borrow \$10,000 so that Christine can buy an accessories business".

Fadi: "If we lend him any money, we will never get it back".

Me: "I know, but he's my brother and perhaps this will help them with a steady income".

Fadi: "Ok but I'm calling the accountant to get some advice".

52. After Fadi spoke with our accountant, he said to me words to the following effect:

Fadi: "The accountant says we should make any payment from the Trust as a distribution to Yacoub, that way all payments are at least tax deductible to us".

53. Thereafter, I received a number of calls from the Plaintiff during which he asked me whether Fadi and I would lend him the money he had earlier requested.

54. Over the next 13 days 5 June 2015 to 18 June 2015 payments totalling \$7,500 were made to the Plaintiff.

55. I was not responsible for making the payments to the Plaintiff's account. I understand that the payments were made by the bookkeeper who worked for Fadi at the time.

56. Shortly after the bookkeeper made the transfer of \$500 to the account provided by the Plaintiff on 18 June 2015, I received a barrage of calls from the Plaintiff during which he asked for more money as he was in serious financial difficulty.

57. In or about late June 2015, I had a conversation with the Plaintiff in words to the following effect:

Plaintiff: "Sister I'm in trouble. I need your help to pay the rent and my expenses. If I don't get some money immediately my family will be evacuated from our house as I cannot pay the rent".

Me: "What has caused this, what have you done?"

Plaintiff: "I have a successful business, but I need to get back to ff. I need a loan to get my business going again or I will lose everything".

Me: "No I cannot. I don't have money just lying around".

Plaintiff: "Mary you don't understand how serious this is. You need to help me, I am your brother. My wife and kids will be homeless".

Me: "I will speak to Fadi about lending you some money for rent until you get back on your feet. That's the best I can do".

Plaintiff: "Please sister, I really need your help".

58. Over the next month or two, the Plaintiff rang and sent me text messages on numerous occasions. He subsequently wanted about \$50,000 as a loan "to get his business going again", although this later became the sum of \$38,000. I did not discuss with Fadi the Plaintiff's request for a loan, as I knew he would never agree to 'lending' the Plaintiff such a large amount of money as we would never get it back. Further, Fadi and I didn't have that type of money to lend to the Plaintiff in any event.

- 61 Mary put into evidence text messages which she received in the period from 8 June 2015 to 6 August 2015 from a telephone number which she understood to be attached to Joseph's mobile phone (and which she recorded in her mobile as attributable to "Jacob"). Joseph could not recall in cross-examination what his mobile phone number in the period June to August 2015 was (T35). His explanation for this was that when he went to prison on 11 August 2015 he was required to give up his mobile phone and it was not returned to him. However, Joseph's inability to recall his mobile telephone number from that period is surprising, to say the least, given that he was apparently able to recall the detail of a conversation 20 years ago, and the detail of another conversation (including several numbers) in May 2015. Joseph had been aware that there was an issue as to whether the text messages were sent from his mobile phone since Mary's affidavit of 27 February 2022 was filed and served. It was within the power of Joseph (and not the defendants) to tender evidence to prove what his mobile phone number was in June to August 2015. That failure

is not explained and I infer such evidence would not have assisted his case:  
*Jones v Dunkel* (1959) 101 CLR 298 at 320 – 321.

- 62 The text messages referred to requests for money to assist with the payment of rent and other expenses of Joseph and his wife which correlate to the dates when payments were actually made to Joseph or a company he controlled called YIK Support Services Pty Ltd. These text message provide an explanation for the payments made to him by Mary or the Trust in the period around the time of the alleged conversation in May 2015 occurred and provide no support for the existence of an agreement of the kind alleged by Joseph.

*(c) Mr Hatoum's evidence*

- 63 Mr Hatoum gave evidence regarding the establishment and operation of the CityWide business which I have summarised above. In addition, he gave evidence that Joseph worked in the CityWide business in Sydney as a courier driver for about 6 to 9 months in the period 1998 to 1999, during which time he received numerous complaints about Joseph being late, taking too long to perform deliveries, and sometimes not showing up at all. He said that had it not been for his relationship with Fadi, he would not have permitted Joseph's employment in the business in that period to continue without improved performance. He denies any discussion between him and Joseph regarding Joseph taking any interest in any CityWide franchised stores in Western Australia or elsewhere or any discussion with Fadi about an agreement for the plaintiff to have any involvement in any capacity in the franchised stores in Perth located at Karinyup and Carousel which were acquired by Fadi (through the Trust) in 2000.

**The Trust**

- 64 The Trust was established by a deed dated 8 June 2000 between Ibrahim as settlor and Fadi as trustee (**trust deed**). It takes the form of a relatively standard family discretionary trust.
- 65 Clause 3.1 of the trust deed confers on the trustee the power to pay or apply all or any part of the net income of the Trust for any one or more of the "General Beneficiaries". The expression "General Beneficiaries" is defined in clause 1 of the trust deed relevantly as follows:

1.9 'General Beneficiaries' shall mean and include:

1.9.1 the Specified Beneficiary or the Specified Beneficiaries (as the case may be);

1.9.2 the parents grandparents brothers sisters spouses widows widowers children grandchildren uncles aunts and cousins of the Specified Beneficiary or Specified Beneficiaries and the spouses widows widowers children and grandchildren of such brothers and sisters spouses children grandchildren uncles aunts and cousins;

1.9.3 any of the following entities whether formed in Australia or elsewhere namely:

1.9.3.1 the trustees (in their capacity as such) of any eligible trust;

1.9.3.2 any eligible corporation;

1.9.3.3 any other legal person at least one share or other interest in which is beneficially owned or held by any beneficiary (including the trustee of an eligible trust and an eligible corporation);

1.9.3.4 any charity;

1.9.4 such other persons corporations and trusts (if any) as may be named described or defined in the Schedule as additional members of the class of General Beneficiaries;

...

66 The expression "Specified Beneficiary" is defined to mean the persons named in the schedule to the trust deed, which are the children of Fadi and Mary.

67 In the schedule to the trust deed, there are additional persons identified as being members of the class of General Beneficiaries which include Fadi and Mary.

68 There is no specific mention of Joseph in the trust deed although he is a General Beneficiary by reason of clause 1.9.2. Nor is there any mention of CityWide or its franchised stores.

### **Consideration**

69 The resolution of this case turns on whether the Court should accept the evidence of Joseph and Mr Mansour as to the conversations said to have to have occurred on 6 November 1999 and in May 2015. For the reasons given above I have rejected Mr Mansour's evidence. For the reasons which follow, I do not accept Joseph's evidence regarding those matters.

70 *Alleged meeting on 6 November 1999*



- 71 I do not have an actual persuasion, on the evidence before the Court, that the alleged meeting of 6 November 1999 occurred, or that if it did occur the words attributed to Joseph, Fadi and Mary in paragraph 15 of Joseph's 12 October 2020 affidavit were said. The reasons for this are as follows.
- 72 First, there is no contemporaneous record of the meeting or what was said at the meeting. In cross-examination, each of Joseph and Mr Mansour said, for the first time, that Mr Mansour had kept a note (T176 and T210 – 211), but a copy of the note was never produced. In the absence of a contemporaneous record I regard it as implausible that Joseph would recall in such detail the conversation which he records in paragraph 15 of his affidavit which occurred over 20 years before he made his affidavit.
- 73 Second, Joseph gave an implausible explanation for why Mr Mansour came to the meeting. He said in his affidavit that he told Mary he would bring Mr Mansour to the meeting so that he could be a witness (paragraph 14). However, he also said that he did not arrange for lawyers to document the transaction discussed at the meeting because he trusted Mary and Fadi (paragraph 18). Joseph provided no adequate explanation in cross-examination for why, if he trusted Mary and Fadi, he needed to bring a witness to the meeting.
- 74 Third, Joseph could not explain how he remembered that the date of the meeting was 6 November 1999, beyond saying it was the date he borrowed \$30,000 in cash from Mr Mansour which is not a credible explanation. Joseph's evidence in cross-examination on this topic was as follows (T105 - 106):

Q. Sir, going back to the conversation that occurred on 6 November 1999, I didn't ask you, it's the only other date that you're able to specify, going back to these conversations that occurred about 23, or more than 20 years ago, in your affidavit, how is it that you were able to recall that particular date?

A. Sorry, which date? Sorry.

Q. 6 November 1999.

A. Because it's the date I borrowed 30,000 from Rimon Mansour in cash.

Q. Do you have any documents, sir, to evidence that money that you

A. We - we - me and - me and my second cousin, we - we - we don't deal with documents. He gave it to me and I repaid him.

Q. But how is it that you're able to recall that that occurred on 6 November 1999?

A. Because he wrote it down, 6 November, when I - when - when he gave me the money, and I - I remember it.

Q. You say Mr Mansour has a note of the money, or the date that he loaned you \$30,000. Is that what you're saying?

A. Of course he does.

Q. Is that a note that you looked at before giving your evidence today?

A. No, no, no. I - I - it - I'd - I'd - I trusted him, I trusted him, a hundred per cent.

Q. I just want to understand, though, sir, about this note. Did you look at this note?

A. I'd - he - he probably wrote it somewhere, "6 November I lent Joe 30,000."

Q. But sir, how is it that you are able to recall that date?

A. Because I borrowed that money from him on 6 November 1999.

Q. I understand your evidence is that you made no note of any of these conversations?

A. Of course, because I - I could remember the time that I borrowed the money.

Q. How is it though that you can say to his Honour and say in your affidavits that it occurred on 6 November? I'm just trying to understand.

A. Well, it was, like I told you, it's - it's the date that I borrowed the money from him, to - to pay, to pay him, to give it to my sister.

75 There is no evidence beyond mere assertion that Mr Mansour had \$30,000 in cash in November 1999 to provide to Joseph or that Joseph borrowed \$30,000 in cash from Mr Mansour in November 1999 or paid \$30,000 in cash to Fadi and Mary in November 1999 or at any other time. There is no evidence to substantiate any repayments by Joseph to Mr Mansour of a borrowing of \$30,000.

76 There is no evidence at all that Joseph paid the remaining \$45,000 referred to in paragraph 15 of his 12 October 2020 affidavit. Nor are there any contemporaneous records to support the assertion that Joseph had earned \$45,000 from driving taxis which he had "deposited" with his parents by November 1999. Joseph did not call either of his parents to give evidence regarding the \$45,000 "deposited" with them and their absence was not explained. I draw the inference that their evidence would not have assisted Joseph's case: *Jones v Dunkel*.

- 77 Having observed Joseph closely during his lengthy cross-examination, I consider Joseph's evidence as to the date of the alleged meeting, what was said in the meeting if it occurred and the "loan" of \$30,000 to be unreliable and I reject it.
- 78 Fourth, it is permissible to have regard to post-contractual conduct to determine whether a contract was entered into. There is no evidence of any subsequent conduct by Joseph or the defendants which supports the conclusion that a contract came into existence on 6 November 1999 regarding the acquisition of franchised stores in Perth by the defendants, pursuant to an arrangement of the kind set out in paragraph 15 of Joseph's 12 October 2020 affidavit. Nor is there any evidence, beyond his bare assertion, that Joseph did anything to establish the two franchised stores at Karingyup and Carousel in late 1999. In particular, there is no evidence, beyond Joseph's bare assertion, that he made any demand on the defendants that asserted the existence of a contract in the terms alleged until 2019, some 20 years later when his then solicitor sent the letter referred to at [36] above.
- 79 Fifth, the alleged contract is inherently implausible. Fadi had by 6 November 1999 been the operations manager of the City Wide/Looksmart business for four years and was clearly successful and experienced in managing the operations of the business and highly regarded by Mr Hatoum. In contrast, there is no evidence (beyond Joseph's uncorroborated assertion) that Joseph had any real experience in the conduct of the City Wide/Looksmart business, or any other business apart from taxi driving. Why would Fadi agree to an arrangement whereby he would do all the work in conducting the new business enterprise and bear all the expenses but only share in 50% of the profits? No rational answer to this question was provided by Joseph in cross-examination.
- 80 Sixth, both Fadi and Mary denied that the meeting on 6 November 1999 occurred or any discussions of a business venture of that kind ever took place. Mr Hatoum also denied any discussions with Joseph of the kind asserted by Joseph in his various affidavits in support of his assertion that such an agreement was entered into. I had the benefit of observing each of Fadi, Mary and Mr Hatoum in cross-examination and formed the view that each of them

was an honest witness who did their best to give truthful and accurate evidence regarding their interactions with Joseph at the relevant times, including his limited involvement with CityWide in the period leading up to the establishment of its franchised stores in Perth in 1999 and 2000. I accept their evidence as accurate and reliable.

### **Alleged conversation in May 2015**

- 81 I do not have an actual persuasion that the alleged conversation in May 2015 referred to in paragraph 29 of Joseph's 12 October 2020 affidavit, or the other conversations referred to in paragraphs 31 and 32 of that affidavit, occurred.
- 82 First, the alleged conversations are denied by Mary who I have accepted as a truthful witness. I accept her evidence as accurate and reliable.
- 83 Second, the alleged conversations are implausible. I have referred at [58] above to the evidence of the financial position of the defendants in May 2015. I consider it highly unlikely that Mary would have agreed so readily to pay \$1.45m to Joseph in May 2015 given the financial position of Mary and Fadi at that time. Also, the alleged conversations are predicated on there being a business arrangement of the kind which Joseph alleges was made in the alleged meeting on 6 November 1999, which I have rejected.
- 84 Third, the alleged conversation in May 2015 is not corroborated by any contemporary record. Nor is it mentioned in the first written demand Joseph made to Fadi and Mary in the letter dated 29 March 2019 as noted above, and that is a significant matter against the existence of any such agreement. Joseph sought to support the alleged agreement by reference to the evidence of Mr Mansour that he overheard the conversation. I have rejected that evidence. It is significant that Mr Mansour's presence at the time of the telephone conversation was not raised by Joseph in his 12 October 2020 affidavit. The failure to note such a significant matter in his own account of the conversation is a further matter which casts significant doubt on the accuracy of evidence of the conversation.

## **Conclusion**

85 For the above reasons, Joseph has not established that either the 1999 Agreement or the 2015 Agreement was entered into. Accordingly, the plaintiff's claim should be dismissed with costs.

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