HIGH COURT OF AUSTRALIA

**Public Information Officer**

27 August 2008

MASTER EDUCATION SERVICES PTY LIMITED v JEAN FLORENCE KETCHELL

A breach of the Franchising Code of Conduct by a franchisor did not necessarily bring a franchise contract to an end as other remedies were available, the High Court of Australia held today.

Section 51AD, in Part IVB of the *Trade Practices Act* (TPA), provides that a corporation must not contravene an applicable industry code, such as the Franchising Code of Conduct. Clause 11(1) of the Code provides that a franchisor must not enter into a franchise agreement or receive non-refundable money under an agreement unless a prospective franchisee provided a written statement that they had received, read and had a reasonable opportunity to understand the disclosure document and the Code. Master Education Services (MES), as franchisor, gave Ms Ketchell a disclosure document and a copy of the Code before executing a franchise agreement with her on 11 February 2000, but it failed to obtain the statement required by clause 11(1).

In August 2003, MES brought proceedings in Campbelltown Local Court to recover $26,043.59 in monthly fees due under the franchise agreement plus interest. Ms Ketchell claimed that MES failed to comply with clause 11 of the Code so that it was unlawful for MES to receive the money and cross-claimed for unconscionable conduct under section 51AC of the TPA. The Magistrate dismissed the claim of unconscionable conduct and found that Ms Ketchell had received legal advice and had obtained various amendments to the franchise agreement through her solicitor. She conducted the business on a trial basis for 12 months before signing the franchise agreement. The Magistrate found that clause 11(1) had not been complied with but that the contravention did not make the contract illegal although damages might be awarded for any loss and damage suffered. The NSW Supreme Court set that judgment aside and remitted it for full determination with respect to non-compliance with clause 11(1) of the Code. The Magistrate gave judgment for Ms Ketchell on the basis that the Court could not require payment since it would involve MES breaching clause 11(1) by receiving the money. MES appealed to the Supreme Court which held that non-compliance did not render the franchise agreement illegal. Ms Ketchell then successfully appealed to the Court of Appeal, which held that section 51AD, read with clause 11 of the Code, directly prohibited the contract and the recovery of money. MES appealed to the High Court.

The Court unanimously allowed the appeal. It held that while failure to comply with clause 11(1) was a contravention of section 51AD of the TPA, it did not result in the contract being void and unenforceable. The prohibition in section 51AD was directed to securing compliance by franchisors with industry codes and the consequence of contravention was the grant of remedies provided in Part VI of the TPA. These included compensation for loss and damage, varying the terms of an agreement entered into in breach of the Code, or termination of an agreement. The Court held that the TPA provided a more flexible approach than the common law. Under the common law the agreement may have been rendered void for contravention of section 51AD. Such a result may have harsh consequences and not necessarily be what a franchisee wanted. The Court ordered Ms Ketchell to pay MES $26,043.59 plus interest dating back to 15 August 2003.

- *This statement is not intended to be a substitute for the reasons of the High Court or to be used in any later consideration of the Court's reasons.*

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