## LEGAL UPDATE

**First decision on the basis of the Dutch Franchise Act!**

Date: 2 April 2021

123Wonen, a franchiser, terminated the franchise agreement with one of its franchisees and subsequently initiated interim relief proceedings against it demanding performance of the non-compete and non-solicitation clauses in the agreement. Given that the Dutch Franchise Act (*Wet franchise*) took effect on 1 January 2021, the Interim Relief Judge of the Overijssel District Court (Almelo location) applied it in its judgment of 24 February 2021. In paragraph 4.7, the Interim Relief Court found "that the primary purpose of non-compete and non-solicitation clauses in franchise agreements is to enable the franchiser to transfer its know-how to the franchisee and provide a certain level of assistance in applying the franchiser's methods, without the franchiser running the risk of that know-how and assistance benefitting its competitors, even indirectly. The question that must therefore be answered is whether know-how has been transferred" to the franchisee.

To ascertain what should be considered as know-how, the Interim Relief Court proceeded from the definition of it given by the Dutch Franchise Act (see para. 4.8 of the judgment). Article 7:911(2)(a)(2) of the Dutch Civil Code defines know-how as: "an entirety of practical information, not protected by intellectual property rights, resulting from experience and testing by the franchiser and which is secret, substantial and identified".

The Explanatory Memorandum (pp. 23 and 24) states the following in this regard:
"Further, the term «franchise formula» also includes, as is shown by paragraph a(2), the franchiser's knowledge that does *not* qualify for protection by intellectual property rights, i.e. its know-how. In this definition, «secret» means that the know-how is not generally known or easily obtained. Further, «substantial» means that the know-how is important and useful to the franchisee in operating the franchise company, and «identified» means that the know-how has been fully described to such an extent that it possible to verify whether it meets the secrecy and substantiality criteria."

The Subdistrict Court then established (in para. 4.9) that the above definition, as provided in the Dutch Franchise Act, is a codification of the description of know-how that is already widely accepted and commonly used in practice, meaning that it also had to be applied in the dispute at hand. The Interim Relief Court found that, in this case, the franchiser's submissions had not been sufficient for the court to find that know-how had been transferred. The Interim Relief Court held that the franchiser had not provided sufficient substantiation that the knowledge and information that had been transferred in *inter alia* the manual met the aforesaid criteria. The court also found that it had not been sufficiently substantiated that the information referred to should be regarded as unique and/or secret. The fact was that much of it was generally accessible to the public or could be obtained quite easily.

In a finding made for the record, the Interim Relief Court added that even if it were assumed that know-how had been transferred, the franchiser had still provided insufficient substantiation that its interest in protection of that know-how should lead to its claims being awarded. The franchisee was in any case obliged to keep that know-how confidential on the basis of the relevant clause in the franchise agreement. Without further substantiation, which was lacking, it could not be assumed that the franchiser would suffer any appreciable harm if the franchisee itself were to use that technical know-how.

Given the finding that the franchiser did not have a legitimate interest in performance of the post-contractual clauses claimed in the proceedings, the court declared the franchiser's claims inadmissible.

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