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Not Your Ordinary Cup of (Bubble) Tea:
The Fickle Nature of Motions for Interlocutory Injunctive Relief

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As lawyers well know, to obtain an interlocutory injunction, the moving party will have to meet the well-established three-part test established by the Supreme Court of Canada in *RJR-MacDonald Inc v Canada*, [1994] 1 SCR 311, 333–34 (the "**RJR-MacDonald test**"):

1. Is there a serious issue to be tried?
2. Will the moving party suffer irreparable harm if the injunction is not granted; that is harm that cannot be compensated by damages?
3. Does the balance of convenience lie in favor of granting the injunction?

In the context of a franchisor/franchisee relationship, often it is the franchisor which seeks injunctive relief to prevent the continued operation of the (franchised) business by a (former) franchisee. However, there are instances in which a franchisee will seek injunctive relief against the franchisor. In this context, proof of irreparable harm, *i.e.*, harm which cannot be compensated by damages, is sometimes difficult to establish. The recent decision of 9925350 Canada Inc. and Hong Thuy Thi Nguyen (the "**Plaintiffs**") and Kevito Ltd. (the "**Franchisor**") is one example of the kind of evidence that a franchisee needs to assert in order to overcome this difficulty.

BACKGROUND FACTS

The Plaintiffs had entered a franchise agreement dated November 10, 2016, with the Franchisor (the "**FA**") for the operation of a Chatime bubble tea franchise. The Chatime location operated by the corporate Plaintiff (the "**Franchisee**") was one of the most profitable locations in the Chatime system.

Over the course of several months in late 2020, and early 2021, the Franchisor conducted several inspections of the Franchisee's business. It is perhaps trite to state that franchise systems generally require that a franchisee adhere to the franchisor's standards and methods of conducting the franchised business, which standards and methods can be varied over the course of time. In this regard, the Franchisor's system was no different than any other franchise system. As a result of these inspections:

A) the Franchisor alleged various breaches of the Franchisor's system standards including, *inter alia*, breaches of health and safety standards;

B) a full-time inspector was stationed at the Franchisee's business to cure breaches of the system standards "in real time".

C) additional financial obligations, and associated legal fees, were imposed on the Franchisee, which the Franchisee challenged;

D) the relationship between the Franchisor and the principal of the Franchisee deteriorated; and

E) the Franchisor took steps to terminate the FA and take over the Franchisee's location.

The Plaintiffs therefore moved for an interlocutory injunction preventing the Franchisor from terminating the FA and interfering with the Franchisee's franchise business pending a judgment on the merits.

THE PARTIES ARGUMENTS

The Plaintiffs asserted that the Franchisor:

A) was required to interpret the Franchisee's obligations, as set forth in the FA and the manual, consistent with its statutory duty of fair dealing in section 3 of the *Arthur Wishart Act (Franchise Disclosure) 2000*, SO 2000 c 3;

B) had a duty of honesty in the performance of contractual obligations as set forth in the Supreme Court of Canada decision in *Bhasin v Hyrnew*, 2014 SCC 71; and

C) intended to take over the Franchisee's profitable location without properly compensating the Franchisee.[1]

The Franchisee alleged that the Franchisor's conduct resulted in breaches of these statutory and common law duties. Examples cited by the Franchisee included breaches asserted by the Franchisor's inspectors noting that the floor of the shop was wet right after a customer had walked in and out on a rainy or snowy day.

The Franchisor asserted:

A) that it was merely trying to enforce its system standards;

B) that it was trying to protect its trademarks and brand standards, and by contrast the Plaintiff would suffer no reputational or livelihood loss; and

[1] The Chattime FA, like most franchise agreements, permitted the franchisor, upon termination, to purchase the assets of the franchised business at their undepreciated capital cost, *i.e.*, without any component for the goodwill of the business.

C) Further, the Franchisor argued that the case was nothing more than a fight about money and so there was no basis for interlocutory injunctive relief. If the Franchisee was successful at trial, it could be compensated by damages.

THE DECISION

The court held that the "serious question" aspect of the RJR-Macdonald test was, in this instance, at the lower end of the threshold issue since the injunction was being sought to challenge whether the Franchisor had acted in good faith in trying to terminate the Franchisee. On this basis, the court concluded that preservation of the *status quo* so that there was something left for the parties to fight about at trial was the best outcome.

On the issue of irreparable harm, the court relied on several decisions which recognize that:

> …where a failure to grant an injunction will result in the destruction of a business, irreparable harm will ensue regardless of whether a claim in damages is part of the plaintiff's case: *Bark & Fitz Inc. v 2139138 Ontario Inc*, 2010 ONSC 1793, at paras 30–33. Courts in Ontario have for some time acknowledged that termination of a franchise, with its attendant loss of profits and business reputation for the owner, constitutes irreparable harm: *TDL Group Ltd. v. 1060284 Ontario Ltd.* (2001), 15 OAC 354. Moreover, the fact that the Defendant says that upon its takeover it will continue to operate the franchise out of its present location is no answer to the fact that the Plaintiffs will have had their own business undermined: *Golden Globe Pizza Inc. v. Domino's Pizza of Canada Ltd*, 2010 BCSC 356, at para 19.[2]

Further, the court concluded that the point of the interlocutory injunction is whether:

> … if no interlocutory injunction is granted, the business owner will have this business to come back to if her position is vindicated at trial…. The nature of the relationship between the parties is such that the franchisor holds the cards. It is necessary for the franchise to be preserved in the franchisee's hands pending trial if the trial itself is not to be rendered in some respect moot by the franchisee's irretrievable loss of the business.

Finally, in terms of the balance of convenience, the court was persuaded that permitting the Franchisee to continue to operate pending trial would not result in any harm to the franchise system.

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[2] This should be contrasted by the decision of the court in *2403744 Ontario Inc. v. Canadian Ice Cream Company Inc.* (unpublished). In that case, the franchisee brought a motion for an interlocutory injunction to prevent the termination of a franchise agreement, which the franchisee alleges was improperly terminated. The court stated that to find the franchisee's assertion of irreparable harm valid that the court would have to determine whether the Franchisee had the right to continue to operate the franchised business, which was beyond the scope of the court, and that the harm could be compensated by damages.

For the reasons set forth above, the court restrained the Franchisor from:

A) terminating or acting upon its purported termination of the Franchisee's business;

B) interfering with the continued operation of the Franchisee's business; and

C) carrying out inspections, absent specific leave of the court to the contrary, unless they were at pre-determined and pre-announced intervals which do not exceed the frequency and duration of inspections carried out by the Franchisor for most of its other franchisees.

CONCLUSION

While not concluding that the Franchisor was attempting to expropriate the Franchisee's business without properly compensating the Franchisee, the court did find that there was some merit to the Franchisee's suspicions. Reading between the lines, the court likely formed the view that the Franchisor had improper or ulterior motives in trying to terminate the franchise relationship. As lawyers, we all have an obligation to try to identify, and inform, our clients when their conduct falls outside their statutory and common law good faith obligations of fair dealing and honesty in the performance of contractual relations. Although I have not discussed this case with Franchisor's counsel, given the respect that I have for the firm I can only assume that the Franchisor's counsel advised the Franchisor of its conduct and how this conduct might be interpreted by a court. It is too bad that the Franchisor did not listen to the advice of its counsel.