Toronto Law Journal

Not Such a Beautiful Thing for Franchisee: Harvey's Franchisee Denied Interlocutory Injunction

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Introduction

In *FPMG Hospitality Inc. v. Recipe Unlimited Corporation*, 2021 ONSC 7156 ("***FPMG***"), the Superior court of Ontario provided further guidance on the applicable threshold for step one of the test in *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311 ("***RJR-MacDonald***"), in the context of a franchisee's attempt to compel a franchisor to renew an expired franchise agreement.

Background Facts

FPMG Hospitality Inc. (the "**Franchisee**") operated a Harvey's restaurant in Brantford, Ontario (the "**Brantford Harvey's**") pursuant to a written franchise agreement (the "**Agreement**") with Recipe Unlimited Corporation (the "**Franchisor**") that was set to expire on August 31, 2021. The Agreement did not contain a right to renew. For greater clarity, Schedule A to the Agreement stated: "The Franchisee shall not have any option to renew the Agreement following the Expiry Date." The foregoing was acknowledged by both the Franchisee, and its principal, Okan Zeytinoglu ("**Okan**").

Okan also owns a Harvey's restaurant in Sarnia, Ontario (the "**Sarnia Harvey's**"). The Sarnia Harvey's franchise agreement included a right to renew upon the expiration of the initial 10-year term.

Between October 22, 2020, and June 18, 2021, the Franchisor provided the Franchisee with numerous reminders of the Agreement's pending expiry and of its plans to not enter into a new franchise agreement for the Brantford Harvey's, although the Franchisor did inform Okan of their intention to work with him to renew the Sarnia Harvey's franchise agreement.

On August 30, 2021, the day before the Agreement expired, the Franchisee commenced a proceeding which requested various relief, including that the Franchisor extend the term of the Agreement for another 10 years, and for awards of damages for negligent misrepresentation, breach of contract, breach of the duty of good faith, breach of the duty of fair dealing, and breach of the *Arthur Wishart Act (Franchise Disclosure*), 2000 S.O. 2003 c. 3 (the "***AWA***"). Contemporaneously with the proceeding, the Franchisee brought a motion for an interlocutory injunction asserting that it was entitled to an extension of the Agreement for another 10-year term based on the Franchisor's conduct. Not surprisingly, the Franchisor disagreed and maintained that there was no right of renewal and the Agreement expired.

The Applicable Threshold: Prohibitory or Mandatory Injunction

To obtain an interlocutory injunction and permit the Franchisee to remain in possession of the Brantford Harvey's until the adjudication of its claim, the Franchisee was required to meet the three-part test in *RJR-MacDonald*, which included proving:

(1) There is a serious question to be tried (or, in exceptional cases, the plaintiff has a strong *prima facie* case);

(2) Irreparable harm, that cannot be compensated by monetary damages, will be suffered if the injunction is not granted; and

(3) The balance of convenience favours granting the injunction.

In analyzing the threshold for step one, it is important to understand the difference between a mandatory injunction and a prohibitory injunction. The former requires that the defendant take action whereas the latter prohibits the defendant from taking action. The import of this distinction is that a higher threshold of a strong *prima facie* case is imposed on an applicant if its request is for the defendant to act positively. More specifically, "the applicant must show it is clearly right and that there is a high degree of assurance the applicant will succeed in obtaining a permanent injunction at trial."

The court cited *674834 Ontario Ltd. (c.o.b. Coffee Delight) v. Culligan of Canada Ltd.*, (2007) 28 B.L.R. (4th) 281 ("***Culligan***"), in its analysis to determine the type of request sought by the Franchisee. Since the Franchisee's relief was in the form of a mandatory injunction, the court held that the applicable threshold for step one of the test in *RJR-MacDonald* was that the Franchisee meet the higher threshold i.e., that it had a strong *prima facie* case. The court contrasted *FPMG* with *Culligan* on this pertinent fact, as the franchise agreement in *Culligan* was still in existence when terminated by the franchisor which required the franchisee in that case to meet the lower standard of there being a serious issue to be tried.

Lack of a Strong *Prima Facie* Case

The court found the Franchisee did not establish a strong *prima facie* case for any of its causes of action for the following reasons:

(1) with respect to its negligent misrepresentation claim against the Franchisor, the court stated that:

(a) the evidence was clear that Okan was fully informed of the Agreement's expiration with no right to renew;

(b) the Franchisee never informed the Franchisor, prior to the commencement of the action, about the alleged representation regarding the option to renew, making the assertion not plausible; and

(c) the Agreement contained an entire agreement clause which made it clear that there were no representations or statements not contained in the agreement that formed part of the Agreement;

2) with respect to the claims for breach of the duties of fair dealing and good faith, the court too found the Franchisee's position to be weak. Citing *TDL Group Ltd. v. 1060284 Ontario Ltd.*, [2000] O.J. No. 1239 and *6646107 Canada v. The TDL*, 2019 ONSC 2240, the court affirmed that a franchisor's refusal to renew does not constitute a breach of the duties of good faith and fair dealing where there is no contractual right to renew; and

3) with regard to the claim that the Franchisor failed to provide the proper disclosure document required by s. 5 of the *AWA*, the court held that there was a lack of sufficiency as the evidence given by both parties was too uncertain to consider.

In addition to the causes of action plead by the Franchisee, the court considered the remedies it sought at this step of the test. In the court's opinion, the chances of the Franchisee succeeding on a request for a final mandatory injunction compelling the Franchisor to enter into a contract was extremely remote. Therefore, the court reasoned that it was not appropriate to grant injunctive relief on an interlocutory basis when there was a very remote possibility the Franchisee would obtain that relief at trial.

Ultimately, the court concluded the Franchisee did not meet the required threshold and based on this alone, dismissed its motion.

<u>Will FPMG Suffer Irreparable Harm?</u>

In the event the Franchisee would have been able to meet the threshold at step one, the court analyzed the Franchisee's position that damages would not adequately compensate for the destruction of its business. In this respect, the Franchisee submitted that Okan would lose all the money he invested into the Brantford Harvey's if it would not be able to remain in possession. In response, the court again emphasized the Franchisee's awareness of the Brantford Harvey's lifespan, and considering this actuality, whatever investments Okan made were done with the expectation of the operation coming to an end on August 31, 2021. With that, the court found the Franchisee was unable to meet the threshold at step two.

<u>The Balance of Convenience</u>

The court went even further to find that even if the Franchisee was able to meet the thresholds at step one and step two, the balance of convenience in any case did not work in its favour. On this point, if the Franchisee were permitted to continue operating the Brantford Harvey's until the adjudication of its claim, the Franchisor would be forced into a relationship against its will even though the Franchisee had no right to continue its operations beyond August 31, 2021.

<u>Practice Takeaways</u>

There are a handful of (sometimes, overlooked) takeaways to be appreciated by the court's decision in *FPMG*.

First, with respect to the court's final remarks when analyzing the Franchisee's entitlement to injunctive relief, it concluded "any right of the Franchisee expired on the face of the Agreement, as of August 31, 2021." This statement precisely sums up the court's rationale in dismissing the Franchisee's motion. The court stood firmly by the contents of the Agreement, as it then was (expired), when analyzing the test under *RJR-MacDonald* and considering the applicable threshold set out in *Culligan*.

Second, the court's frequent reference to the Sarnia Harvey's franchise agreement demonstrates the importance of spelling out the terms of the franchise agreement. It was clear from the court's emphasis in highlighting the Franchisor's intention to renew the Sarnia Harvey's, that there could be no ambiguity in its plans to not renew the Brantford Harvey's with the Franchisee as set forth in the Agreement.

In *FPMG* the court, continuing a long line of cases which have held a franchise agreement is "a written document which is fulsome and complete on its face" and that anything outside of the document's bounds is not part of the arrangements. In other words, the contract says what it says.

Finally, although not part of the written decision, the authors suspect that there may have been other reasons why the Franchisor did not wish to afford the Franchisee the grant of a renewal right, perhaps attributable to the Franchisee not properly operating the Harvey's system and/or the existence of numerous defaults. In the face of this conduct (which again is conjecture on the part of the authors), contrast what the result might have been if the Franchisor had attempted to terminate the Agreement for breach, in which case the Franchisee might have had more success in its motion for prohibitory injunctive relief (obviously depending on the breadth and depth of the evidence as to the various breaches). The lesson for franchisors and their counsel is that sometimes it is easier to wait until the franchise agreement expires, rather than to terminate during the term of the agreement.