

CANADA / JUDGMENT

Garcha Bros. Meat Shop Ltd. v. Singh

2021 BCCA 134

COURT

British Columbia Court of Appeal

DECIDED

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2021 BCCA 134 Garcha Bros. Meat Shop Ltd. v. Singh

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

Garcha Bros. Meat Shop Ltd. v. Singh,

2021 BCCA 134

Date: 20210326

Docket: CA47351

Between:

Garcha Bros. Meat Shop Ltd.

Respondent

(Plaintiff)

And

Arshpreet Singh, Kulwinder Kaur Sandhu and 11270058 B.C. Ltd.

Applicants

(Defendants)

Before:

The Honourable Madam Justice Griffin

(In Chambers)

On appeal from: An order of the Supreme Court of British Columbia, dated March 19, 2021
(Garcha Bros. Meat Shop Ltd. v. Singh, New Westminster Docket 232568).

Oral Reasons for Judgment

Counsel for the Appellants (via teleconference):

G. Allen

S. Slader, Articled Student

Counsel for the Respondent (via teleconference):

R.J. Morton

Place and Date of Hearing:

Vancouver, British Columbia

March 26, 2021

Place and Date of Judgment:

Vancouver, British Columbia

March 26, 2021

Summary:

The applicants are defendants in a claim alleging they breached a restrictive covenant in a franchise agreement with respect to the operation of a meat shop. The respondent franchisor obtained an injunction order that would have the effect of requiring the applicants to immediately cease operating their current meat shop business. The applicants seek an interim stay of the injunction order, pending bringing a leave to appeal application. Held: Application for an interim stay granted. The reasons for judgment in respect of the injunction order were not transcribed in time for the stay application. The applicants satisfy the tests of irreparable harm and balance of convenience in support of an interim stay. The issues involving the interpretation of a franchise agreement and enforcement of a restrictive covenant are complex and it is not unlikely that a meritorious issue could be developed on appeal. The merits will be assumed for purposes of the interim stay only. The question of the preliminary merits of the appeal will be for the judge hearing the application for leave to appeal.

- [1] GRIFFIN J.A.: The applicants--Arshpreet Singh, Kulwinder Sandhu, and 11270058 BC Ltd.--apply for an interim stay of the order of Justice Harvey on March 19, 2021, pending the hearing of an application for a stay pending appeal at the same time as an application for leave to appeal.
- [2] The applicants additionally apply to abridge the service deadlines required for such an application under Rule 9(4) of the Court of Appeal Rules. Due to the urgent nature of this application, the application to abridge the service timelines is granted.

- [3] Also due to urgency, the oral reasons of Harvey J. have not yet been transcribed and the order has not yet been entered. The transcript of the reasons have been ordered on an expedited basis. The applicants filed a notice of application for leave to appeal on March 24, 2021.
- [4] The order of Harvey J. imposed an injunction on the applicants, restraining them from operating their meat shop. The injunction is set to commence after midnight on March 28, 2021. Since today's hearing is on a Friday, it is effectively the last day the applicants can bring an application to stay the injunction before it takes effect.
- [5] Ms. Sandhu has undertaken to abide by any damages award resulting from a stay. She says she will also provide accounting records and is willing to make changes to the appearance of the meat shop if requested. She holds a beneficial interest of approximately \$400,000 in equity in her family home and says because of this she has the financial ability to honour any such award.
- [6] The respondent and its principal, Mr. Garcha, say they have sufficient assets and also have undertaken to pay damages in relation to the injunction the respondent has obtained. Mr. Garcha says he has assets worth between \$1 and \$2 million.

Background

- [7] Both parties rushed to file materials in respect of today's application and the materials do not include the pleadings below. I necessarily rely on the background information provided by the parties, but with the proviso that due to the urgency, the record may reveal the need to correct some of this background or my understanding of it.
- [8] The applicant numbered company operates a meat shop under the name Great Choice Meat and Poultry ("Great Choice") and has done so since approximately October 2020, operating out of a premise on 6th Street in Burnaby (the "Premises"). Mr. Singh is an employee at Great Choice, while Ms. Sandhu is the sole director and shareholder of Great Choice. Mr. Singh and Ms. Sandhu are related by family.
- [9] The respondent, Garcha Bros. Meat Shop Ltd. ("Garcha Bros."), operates a franchised meat shop business.
- [10] Great Choice is the assignee of a lease at the Premises. The assignor is a company SJP Enterprises Ltd. ("SJP"). The principal of SJP is Mr. Singh's wife.
- [11] The assignor of the lease, SJP, was party to a franchise agreement with Garcha Bros. and had operated a meat shop at the premises. Garcha Bros. terminated that agreement in September or October 2020, for alleged breaches by SJP.

- [12] The franchise agreement contained a restrictive covenant which provided that in the event of termination, the franchisee would not engage in a "franchise business" at the Premises or within 10 kilometers of that location for a 30 month time period. The term "franchise business" is not defined in the agreement.
- [13] The applicants say that none of them are parties to the franchise agreement.
- [14] Garcha Bros. brought a claim against SJP as well against these applicants. Garcha Bros. applied for an interim injunction restraining the appellants from operating any business similar to the franchise business within 10 km of the Premises. The application was heard by Harvey J. on December 18, 2020, and February 29, 2021.
- [15] In oral reasons for judgment on March 19, 2021, the chambers judge granted the interim injunction against the applicants. As mentioned, it takes effect after midnight on March 28, 2021, subject to the proviso that the respondent first file an appropriate undertaking as to damages.

Applicable Law

- [16] After an appeal or application for leave to appeal is brought, a justice of this Court may order a stay of all or part of the proceedings, including execution, pursuant to s. 18(1) of the Court of Appeal Act, R.S.B.C. 1996, c. 77. A justice of this Court also has the power to order an interim stay of execution pending an application for leave to appeal, in order to prevent prejudice to a person, pursuant to s. 10(2)(b) of the Act: *Melcer Estate v. Boxer*, 2020 BCCA 380 at paras. 18-28 (in Chambers).
- [17] The general principles for granting a stay of execution were summarized by Mr. Justice Smith in *Gill v. Darbar*, 2003 BCCA 3:
- [7] The applicable principles are not in dispute. Generally, a successful plaintiff is entitled to the fruits of the judgment but this Court may stay proceedings if satisfied that it is in the interests of justice to do so: *Voth Brothers Construction (1974) v. National Bank of Canada* (1987), 12 B.C.L.R. (2d) 43 at 44-45 (C.A. [In Chambers]). The trial judgment must be assumed to be correct and protection of the successful plaintiff is a pre-condition to granting a stay: *Morrison-Knudsen Co. v. British Columbia Hydro & Power Authority* (1976), 112 D.L.R. (3d) 397 at 404 (B.C.C.A.). The applicant for a stay must satisfy the familiar three-stage test, that is, the applicant must show that there is some merit in the appeal, that the applicant will suffer irreparable harm if the stay should be refused, and that, on balance, the inconvenience to the applicant if the stay should be refused would be greater than the inconvenience to the respondent if the stay should be granted: *British Columbia (Milk Marketing Board) v. Grisnich* (1996), 50 C.P.C. (3d) 249 at 252 (B.C.C.A. [In Chambers]).

- [18] Of course, the test for granting an injunction is the same three-prong test involving an assessment of the merits; irreparable harm; and the balance of convenience. The essence of the present application therefore is to request that this Court take the exact opposite position on the three-prong test, than presumably did the judge below. What makes this exercise extremely difficult is the lack of reasons for the judgment below.

Should a Stay Be Granted?

Merits

- [19] The parties are represented today by counsel who were not counsel on the hearing before Harvey J.
- [20] The applicants intend to argue on appeal that there was no basis in the pleadings or in the notice of application for an injunction order enforcing the restrictive covenant in the franchise agreement as against the applicants who were not parties to that agreement. They also intend to argue that the chambers judge erred in law in his interpretation and treatment of the restrictive covenant.
- [21] The respondent say that the effective result of the hearing before Harvey J. was to find that the applicants were alter egos of the other parties to the franchise agreement and operating an unauthorized business contrary to the restrictive covenant.
- [22] The merits test is considered from the perspective of whether there is a serious question to be determined: *British Columbia (Milk Marketing Board) v. Grisnich* (1996), 50 C.P.C. (3d) 249 at 252 (B.C.C.A. Chambers). A similar merits test is considered when determining whether leave to appeal ought to be granted.
- [23] Complicating the situation is the fact that the leave to appeal application will likely be heard by a different judge in chambers. A single justice in chambers ought to be slow to depart from a decision in the same case made by another judge in chambers, including as to a preliminary assessment of the merits: *Kitov Resources Corp. v. Alpha Aviation Inc.*, 2020 BCCA 388 at paras. 8, 10. For that reason, when it is practical, the preferred practice is to hear the stay application and leave to appeal application at the same time: *Melcer Estate* at para. 24.
- [24] Here the circumstances I have reviewed make it impractical to delay the hearing of this stay application, as the injunction order is about to take immediate effect. If the appellants delayed the stay application until the hearing of the application for leave to appeal, they would be unable to ignore the injunction order, as to do so would put them in contempt: see *Vancouver (City) v. Weeds Glass & Gifts Ltd.*, 2019 BCCA 190 at paras. 68-70 ("*Vancouver v. Weeds*").

- [25] Yet determining whether the appeal has some merit, even on a preliminary basis, is, as I have already noted, extremely challenging, both from a substantive point of view and from the perspective of procedural fairness. The reasons for judgment of the court below are not yet transcribed. Not all of the materials that were before the court below are yet in the appeal record. Both parties take opposite positions on whether there is a serious question to be tried.
- [26] A preliminary merits test in favour of the respondent would have been a necessary stage of the analysis for the judge in granting the injunction order. In *Quizno's Canada Restaurant Corp. v. 1450987 Ontario Corp.*, 2009 CarswellOnt 3455 (Ont. S.C.), leave to appeal ref'd 2009 CarswellOnt 3455 (Ont. Div. Ct.) ["Quizno's"], the court noted that the measure used for determining whether it is appropriate to enforce a restrictive covenant is a "strong prima facie case" test, which is a higher standard than showing a serious issue to be tried: at para. 41. What test the judge applied in the present case is unknown in the absence of the transcribed reasons.
- [27] At a minimum, knowing what I do about the issues, I am able to conclude that questions involving the interpretation of a franchise agreement and the enforcement of a negative restrictive covenant can be complex and it is not unlikely that a meritorious issue could be developed on appeal. I just do not have enough information to be able to determine whether there is merit in an appeal from the judge's exercise of discretion to grant the injunction.
- [28] I consider the jurisdiction given to a single justice under s. 10(2)(b) of the Act, in circumstances such as this, to be sufficiently broad to permit me to assume that the appeal has merit for purposes of the proposed interim stay only.

Irreparable Harm

- [29] Irreparable harm is harm that cannot be quantified in monetary terms or which otherwise cannot be cured: *Western Forest Products Inc. v. Capital Regional District*, 2009 BCCA 80 at para. 24 (in Chambers). In *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311, the court recognized that irreparable harm will be made out where one party will be put out of business by the court's decision: at 341, citing *R.L. Crain Inc. v. Hendry* (1988), 48 D.L.R. (4th) 228 (Sask. Q.B.); see also *Vancouver v. Weeds* at para. 48.
- [30] The applicants assert the injunction will have irreparable consequences. It will force them to lay off eight employees; those employees may find employment elsewhere and may be difficult to replace. It will prevent the corporate appellant from generating income, and thus render it unable to meet its lease obligations. Its lease requires it to operate a meat shop. The closure will also result in the loss of \$18,000 worth of perishable food.
- [31] The respondent franchisor has approximately 13 franchisees, and submits that it will suffer irreparable harm if the applicants' business is not shut down, because amongst other things it will suffer a loss of control over other franchisees. The respondent filed evidence that other franchisees do not like the fees being charged by the franchisor, and if they learn they

can avoid this in the way avoided by the applicants, they could follow suit and/or decide not to renew their franchise agreements. The respondent says it will suffer a loss of goodwill and the possible loss of the franchise system if the applicant Great Choice continues operating its meat shop out of the Premises.

[32] The respondent relies on *Merrill Lynch Canada Inc. v. Pastro*, 2000 BCCA 243, where this Court held at para. 7:

[7] In this case at bar, the learned chambers judge found the limited restricted covenant to be prima facie effective and in my view that conclusion was certainly open to him on the facts. This case is rather the reverse of a case like *Irwin* where there was no covenant in existence. In cases where there is an effective covenant, the courts should usually give effect to it. The public has an interest, as I observed in *Irwin*, in free competition but there is also a principle of law that contractual agreements ought to be enforced. Although even in a negative covenant case, the court must still have regard to the general principles underlying the grant or refusal of an interlocutory injunction, there is usually a greater readiness to grant interlocutory relief where such a covenant exists. As Hinds J.A. noted in *Milk Marketing Board (B.C.) v. De Jong* (1995), 71 B.C.A.C. 1, this court will usually not interfere with the exercise of discretion by a chambers judge unless it can be shown that the discretion was not exercised judicially or that palpable and overriding error has been demonstrated. Although it has now emerged on discovery that somewhat fewer clients of the Trail office than was formerly suggested may be affected by the change in employment of the applicants, it seems to me that the substantial case for the plaintiff respondent *Merrill Lynch*, has not been affected by any new evidence. The applicants constituted an important segment of the Trail office of *Merrill Lynch* and I am quite unable to say that the chambers judge erred in his assessment of the potential for irreparable harm if the applicants or their new employer were to be permitted to solicit *Merrill Lynch* clients contrary to the restrictive covenant. Likewise, I consider the chambers judge has not been shown to have been in error concerning his assessment of the question of whether damages would be an adequate alternate remedy. What it comes to is that I am quite unable to conclude that the learned chambers judge fell into error in any respect with regard to his analysis of this situation. I see no error in his decision to grant interlocutory injunctive relief. I do not consider that it has been demonstrated that leave to appeal should be granted. Because I have reached this conclusion, I have not found it necessary to address the question of a stay of proceedings pending the hearing of an appeal. In those circumstances, I therefore would dismiss these applications.

[Emphasis added.]

[33] The respondent says the restrictive covenant is central to the franchise system. It relies on *Quizno's*, where it says in similar circumstances an injunction in favour of the franchisor was granted against franchisees. The respondent relies on para. 93 of that case where the Court held:

In my opinion, the franchisor will suffer irreparable harm if an interlocutory injunction is not granted and for the reasons discussed further below the balance of convenience favours granting an interlocutory injunction. It would appear that the franchisees would not be able to satisfy a damages award against them and, in any event, the irreparable harm suffered by the franchisor goes to its goodwill, its reputation, and its responsibility to the franchisees of the chain to maintain the integrity of the franchise system. Damages would not adequately address these harms.

[34] However, it must be noted that in Quizno's, the judge found that the franchisees were engaging in conduct that challenged the franchisor's rules with respect to quality control, and advertising and promotion, which the judge found were matters "fundamental to the franchise system". I am not able to say one way or the other that similar findings would be supported on the evidence here.

[35] Quizno's recognized the other side of the coin as well, finding at para. 95:

And I am satisfied that the franchisees will suffer irreparable harm unless they are granted an interlocutory injunction that maintains the status quo and suspends the termination. The termination of a franchise, the loss or reputation and the loss of goodwill may constitute irreparable harm: TDL Group Ltd. v. 1060284 Ontario Ltd., [2001] O.J. No. 3614 (Ont. Div. Ct.); Erinwood Ford Sales Ltd. v. Ford Motor Co. of Canada Ltd., [2005] O.J. No. 1970 (Ont. S.C.J.); 674834 Ontario Ltd. v. Culligan of Canada Ltd., [2007] O.J. No. 979 (Ont. S.C.J.); 1323257 Ontario Ltd. v. Hyundai Auto Canada Corp., [2009] O.J. No. 95 (Ont. S.C.J.).

[36] The competing applications for injunctive relief in Quizno's were, in the end, resolved by the court weighing the relative strength of the franchisor's claim as against the franchisees' defences. Here I am unable to do that at this early stage.

[37] A problem I have with the respondent's argument as to irreparable harm is that it assumes that the present lawsuit is not already a deterrent to other franchisees considering following the path taken by the applicants. I would have thought that if ultimately the plaintiff succeeds in its lawsuit against the applicants, that will serve to deter other franchisees from following in the applicants' footsteps. Also, if an interim stay is granted until the hearing of the leave to appeal application, this will not be such a long period that it would cause a domino effect and the destruction of the franchise system. I am not persuaded that the respondent will be unable to recover damages if there is a temporary stay of the injunction.

[38] I am persuaded the applicants will suffer irreparable harm if the injunction takes effect, as it will cause them to immediately shut down their business, losing perishable food items and laying off employees.

Balance of Convenience

- [39] As for the balance of convenience, an interim stay will only be in place until the hearing of the application for leave to appeal, unless the stay application is then granted at that time. The parties have indicated that they are willing to cooperate to expedite the hearing of the application for leave to appeal, once the transcribed reasons of the judge are received. In my view there is a likelihood that the matter could be heard within 30 days.
- [40] In my view, an interim stay of the injunction in the meantime will not severely prejudice the respondent, but failure to grant the stay could seriously prejudice the applicants.

Disposition

- [41] For these reasons, I conclude the balance of convenience favours granting an interim stay of the injunction pending a combined hearing of the application for leave to appeal and application for a stay pending appeal.
- [42] I wish to make it clear that the determination of the question of whether or not the appeal has some merit will be for the judge hearing the application for leave to appeal. In other words, the burden will continue to be on the applicants to meet the preliminary merits test on the leave application. The respondent will still have an opportunity to take the position on the leave to appeal application that the appeal has no merit.
- [43] Further, my analysis of irreparable harm and the balance of convenience was based on the stay being interim only, pending an expeditious hearing of the application for leave and for a stay pending appeal. Another chambers judge hearing those applications, and having more information as to the merits, may view the matter quite differently.
- [44] The interim stay will be on terms:
- a) It will be in effect only until the combined hearing of the application for leave to appeal and the fuller stay application.
 - b) The parties will cooperate to seek an expedited hearing of the application for leave to appeal and the application for a stay pending appeal. Either party can seek directions from the Registrar if they are unable to resolve an issue regarding the expedited hearing. Further, if the respondent is of the view that the applications are not being prosecuted with diligence by the applicants, the respondent will have liberty to apply to set aside the interim stay.

"The Honourable Madam Justice Griffin"

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