

CANADA / JUDGMENT

New Beginnings Early Learning (White Rock) Ltd. v. CEFA Systems Inc.

2018 BCSC 2417

COURT

Supreme Court of British Columbia

DECIDED

21 December 2018

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2018 BCSC 2417 New Beginnings Early Learning (White Rock) Ltd. v. CEFA Systems Inc.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

New Beginnings Early Learning (White Rock) Ltd. v. CEFA Systems Inc.,

2018 BCSC 2417

Date: 20181221

Docket: S189321

Registry: Vancouver

Between:

New Beginnings Early Learning (White Rock) Ltd.,

New Beginnings Early Learning (Richmond) Ltd.

Mark Leslie and Jackie Jackson aka Jacqueline Leslie

Plaintiffs

(Defendants by Counterclaim)

And

CEFA Systems Inc. and Natacha Beim

Defendants

And

CEFA Systems Inc.

Plaintiff by Counterclaim

Corrected Judgment: Front page of judgment has been amended to reflect additional counsel for the defendants added on February 6, 2019

Before: The Honourable Mr. Justice Walker

Oral Reasons for Judgment

Counsel for the Plaintiffs:

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A. Cocks

S. Blanco

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Place and Dates of Hearing:

Vancouver, B.C.

November 2 & 23, 2018

December 3-5, 2018

Place and Date of Judgment:

Vancouver, B.C.

December 21, 2018

Introduction

- [1] The defendant, CEFA Systems Inc. ("CEFA"), is the developer and franchisor of a distinctive format of early child learning and junior kindergarten schools, including curriculum. CEFA is incorporated in British Columbia. It is currently embroiled in a dispute with the plaintiffs arising from two different franchise agreements ("Franchise Agreements") that it entered into with the corporate plaintiffs, New Beginnings Early Learning (Richmond) Ltd. and New Beginnings Early Learning (White Rock) Ltd.
- [2] CEFA claims that it has lawfully terminated the Franchise Agreements following their breach by the corporate plaintiffs through unauthorized de-branding of the schools in Richmond and at Morgan Crossing (located in South Surrey, close to White Rock), and is now seeking to enforce the contractual rights provided to it consequent on termination. Specifically, CEFA seeks to enforce its contractual right to purchase the assets of those schools ("Schools") and return of its proprietary materials and trade secrets, including its

operations manual and curriculum, and to prevent a change in control of the plaintiff corporations. It also seeks damages, including damages for the corporate plaintiffs' unauthorized use of confidential proprietary information in operating their new schools.

- [3] On the other hand, the corporate and personal plaintiffs assert that they have elected to rescind the Franchise Agreements and their respective guarantees since they were induced to enter them as a result of intentionally false and misleading misrepresentations of CEFA and its founder, the co-defendant, Natacha Beim. They also seek damages for breach of contract. An expedited trial of the action is scheduled to proceed on August 12, 2019 for 15 days.
- [4] Although in its initial notice of application, CEFA sought broad form interim injunctive relief against the plaintiffs, it very quickly amended its notice of application, narrowing it down to three specific interim orders pending the determination of the myriad of competing allegations and claims at trial. The first order sought, which I granted following the conclusion of the hearing, was an expedited trial date. The second order sought concerned preservation of the Schools' assets. The third order sought by the defendants was to prevent a change in control of the corporate plaintiffs through dissipation or encumbering of the voting shares.
- [5] CEFA does not seek to enjoin the corporate plaintiffs from continuing to operate the Schools and from using and disposing of their revenues. As noted, the focus of its application is to prevent the plaintiffs from disposing of or encumbering the Schools' assets (which CEFA submits it is entitled to purchase at fair market value) and preventing a change in control of the corporate plaintiffs, all of which, it submits, it has the contractual right to do following the termination of the Franchise Agreements.
- [6] The injunctive relief sought by CEFA is framed in its amended notice of application as follows:
 - 1. Pending final disposition of the Action on its merits or further Order of the Court,
 - (c) enjoining the Plaintiffs from disposing of or encumbering any of the assets of the Schools (as defined below), or the shares of either of New Beginnings Early Learning (White Rock) Ltd. or New Beginnings Early Learning (Richmond) Ltd;
 - 3. An Order granting the Parties leave to return before this Honourable Court on two business days' notice for further direction or clarification as may be necessary to give effect to this Order.
- [7] CEFA's application, which is resisted by the plaintiffs, is brought pursuant to s. 39 of the Law and Equity Act, R.S.B.C. 1996, c. 253, Rules 8-1, 8-5, and 10-4 of the Supreme Court Civil Rules [Rules], and the inherent jurisdiction of the Court.

Test for Injunctive Relief

- [8] To succeed on the application, CEFA must demonstrate that there is a serious issue to be tried and establish that the balance of convenience favours granting the injunction. In assessing the balance of convenience, I must be satisfied that if the injunction is not granted, CEFA will suffer irreparable harm that cannot be compensated in damages.
- [9] The threshold to establish a serious question to be tried is low. If the claim is not frivolous or vexatious, the inquiry should proceed to the next stage. A prolonged examination of the merits of CEFA's case is neither necessary nor desirable: *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311 at 334, 337-338; *Google Inc. v. Equustek Solutions Inc.*, 2017 SCC 34 at para. 25; *British Columbia (Attorney General) v. Wale* (1986) 9 B.C.L.R. (2d) 333 (C.A.) at paras. 50-52; *Canadian Broadcasting Corp. (CBC) v. CKPG Television Ltd.* (1992) 64 B.C.L.R. (2d) 96 (C.A.) at paras. 21-26.
- [10] Those cases establish that the factors to be considered when assessing the balance of convenience include:
- (a) whether either party will suffer irreparable harm from the granting or refusal of the injunction;
 - (b) the strength of the applicant's case;
 - (c) which of the parties has acted to alter the balance of the relationship and so affected the status quo;
 - (d) factors affecting the public interest; and
 - (e) any other factor affecting the balance of justice and convenience.
- [11] Irreparable harm is harm that either cannot be quantified monetarily or cannot be compensated. It includes permanent market loss or irrevocable damage to a franchisor's business reputation and the integrity of its system. Proof of irreparable harm is not required. Doubt concerning the adequacy of damages as a remedy is sufficient: *Onkea Interactive Ltd. v. Smith*, 2006 BCCA 521 at para. 18; *Hastings Community Association v. The Vancouver Board of Parks and Recreation*, 2014 BCSC 80 at para. 38; *Quizno's Canada Restaurant Corp. v. 1450987 Ontario Corp.*, 2009 CarswellOnt 2280 (S.C.J.) at para. 93; *Cappuccino Affair Ltd. v. 820295 Alberta Ltd.*, 2000 ABQB 753 at paras. 29-32. If the parties' interests are evenly balanced, which I do not find to be the case in the instant action, where the only effect of an injunction is to postpone the date on which a party, such as the plaintiffs, is able to embark upon a course of action not previously open to it, injunctive relief will be ordered to preserve the status quo: *Wale* at para. 52.

Background Facts

- [12] I wish to emphasize that my findings of fact as described in these reasons are predicated solely on the evidence adduced in the application record. They are not intended to, nor should they, fetter or bind any determinations, factual or legal, made by the trial judge.

CEFA

- [13] CEFA was founded in approximately 1998 by Ms. Natacha Beim. Its system of private junior kindergarten schools and specialized curriculum was developed by Ms. Beim starting in the early 1990s. Ms. Beim was born in Uruguay in 1972 during political upheaval in that country. When Ms. Beim was 14 years old, she and her parents moved to Canada in 1977 as refugees with the assistance of the Red Cross.
- [14] In her evidence, Ms. Beim deposed that she completed her secondary and university education programs, on an expedited basis, ultimately obtaining teaching certificates in Europe as well as a master's degree and doctorate in childhood education from the Universidad de la Republica, which is a university in Uruguay, and a degree or diploma from the Massachusetts Institute of Technology ("MIT").
- [15] Ms. Beim's evidence in this respect is one of the key factual disputes in this case. The corporate plaintiffs assert that they were induced to enter into the Franchise Agreements and the individual plaintiffs assert they were induced to sign personal guarantees based in large part on representations concerning Ms. Beim's educational background, degrees, and teaching credentials. The plaintiffs allege that the representations were not only false, but were made knowingly by representatives of CEFA as well as Ms. Beim, with the intention of inducing them to enter into those agreements.
- [16] In 1998, at age 26, Ms. Beim opened her first junior kindergarten school using the CEFA curriculum ("Curriculum") in West Vancouver. She operated the school herself, trained teachers and staff, and ensured that the delivery of the Curriculum was successful. She developed what she described as a proprietary method or system encompassing the Curriculum, teacher training and methodology, and a distinctive classroom design amongst other elements and components (collectively, the "CEFA Program"). Four years later, in 2002, she decided to franchise CEFA's Program. Approximately 20 schools have opened in the Lower Mainland and Toronto using the CEFA Program. According to Ms. Beim, CEFA schools are popular, maintaining an average enrollment of over 75%.

The Franchise Agreements

- [17] The Franchise Agreements were entered into on June 20, 2015 (Richmond school) and June 25, 2015 (Morgan Crossing school). This was not the first time that the plaintiff, Mr. Mark Leslie, and his wife, the plaintiff, Jackie Jackson (aka Jacqueline Leslie), had entered into contracts concerning CEFA schools. Approximately four months prior, on February 28, 2015, a company owned by Mr. Leslie purchased all of the assets of a CEFA school operating in

Langley, from a company owned by Ms. Beim, by way of an asset sale. The asset sale included the franchise agreement between Ms. Beim's company and CEFA. Mr. Leslie has since sold that school to a third party with whom he is presently engaged, as a defendant, in litigation brought by the purchaser for damages based on alleged misrepresentations by, inter alia, Mr. Leslie as well as breach of contract.

- [18] The key provisions of the Franchise Agreements and the agreement concerning the Langley school are identical in respect of their material terms. Not only does CEFA take pride in the CEFA Program, it takes special care in vetting its potential franchisees since its franchise agreements typically call for a long-term relationship of ten years plus rights of renewal. CEFA wishes to be confident of the people it is dealing with and with whom it is sharing its confidential proprietary information and trade secrets.
- [19] For the purpose of this application, the key terms of the Franchise Agreements provide for:
- (a) a defined area in which the franchised school may operate;
 - (b) non-compete provisions following termination of the agreement;
 - (c) payment of an initial franchise fee and ongoing royalty payments;
 - (d) mandatory teacher training and construction of a school facility in accordance with CEFA's specifications;
 - (e) protection of CEFA's proprietary information and trade secrets;
 - (f) CEFA to have the option to purchase the franchised school's assets upon termination;
 - (g) an option to CEFA to enter into the franchised school and operate the business in certain circumstances;
 - (h) a prohibition of any change in control of the franchised business and prohibiting assignment without CEFA's consent, and a right of first refusal to purchase a quantity of voting shares of a corporate franchisee to acquire control; and
 - (i) CEFA to have the contractual right to seek injunctive relief to compel the franchisee to comply with its contractual obligations.
- [20] A more detailed summary of those provisions is set out as follows.
- [21] CEFA grants the franchisee the exclusive right to operate a CEFA school in a pre-determined location, which is referred to as the "Area of Primary Responsibility" for a term of ten years with renewal rights: cl. 2(1), 3(2), 4(1).
- [22] The franchisee shall pay an initial sum of \$60,000 to CEFA as a franchise fee: cl. 3(1).
- [23] The franchisee is obliged to pay royalty fees of 6% of gross sales to CEFA on an ongoing basis: cl. 3(2).

- [24] All teachers must receive mandatory training in accordance with the standards and qualifications of the CEFA system: cl. 5(3), (9).
- [25] The CEFA school location must be constructed by a contractor approved by CEFA in conformity with its approved layout plans, specifications, and drawings (including exterior and interior layouts, equipment, and décor), all of which are confidential information and constitute trade secrets: cl. 6(4).
- [26] The franchisee must use only those signs, brands, and fixtures approved of by the franchisor in its sole discretion: cl. 6(7).
- [27] The franchisee shall not enter into any lease without the prior approval of the franchisor. The terms of the lease must include provisions required by the franchisor, including CEFA's right to assign the lease to itself: cl. 6(2).
- [28] The franchisee must operate the school and conduct its teaching programs in accordance with CEFA's standards, policies, and procedures as set out in its manual: cl. 9(1).
- [29] The franchisee acknowledges that CEFA's manual is confidential and a trade secret in which it had no part in its creation or development, and further, is something in which CEFA has a substantial investment and a right to protect. The franchisee covenants to protect the confidentiality of the information. The manual is loaned to the franchisee and is at all times the exclusive property of CEFA, and shall be returned upon the termination of the franchise agreement: cl. 9(2)-(7).
- [30] Due to the special and unique nature of the trade secrets and confidential information, CEFA is entitled to immediate equitable remedies, including restraining orders and injunctive relief, in order to safeguard its trade secrets and confidential information: cl. 9(6).
- [31] Following termination of the franchise agreement for any reason, the franchisee and the guarantor shall not, without CEFA's prior consent, at any time for a period of six months after termination, engage in, be concerned with, or lend money to any business operating in competition with or similar to the franchised business within the Area of Responsibility: cl. 14(2).
- [32] The franchise agreement may not be sold or assigned without the consent of CEFA: cl. 15(1).
- [33] If the franchisee is a corporation or partnership or other entity, a transfer of shares or other interests which would affect or result in a change of control of the majority or a block of 40% or more of the voting or equity interests in the franchisee, directly or indirectly, or any other event which would result in the change in any principal of the franchisee active in the day-to-day management and operation of the business, is deemed to be an assignment and subject to the assignment provisions (e.g., CEFA's prior consent and right of first refusal to purchase): cl. 15(6).

- [34] Upon termination of the franchise agreement, CEFA has the right, but not the obligation, to purchase at fair market value, without allowance for goodwill, all or any of the assets of the franchised business, as CEFA determines in its sole discretion, including the contracts entered into between the franchisee and parents (referred to as the "Student contracts") and student and client lists. If the parties cannot agree upon fair market value within a reasonable time, an independent appraiser shall be appointed by CEFA to determine fair market value, and the appraiser's determination shall be binding on the parties: cl. 17(4).
- [35] Further, upon payment of the purchase price of those assets, the franchisee shall in addition to transferring title to the assets purchased, transfer or assign to CEFA all licenses or permits utilized by the franchisee in the conduct of the franchised business which may be transferred or assigned: cl. 17(5).
- [36] In addition to CEFA's right to terminate the franchise agreement (e.g., such right arising upon the breach of the franchisee), it may, at its option in the event of a material default by the franchisee or an event that affects any of the principals, partners, employees, or shareholders of the franchisee which interferes with the normal operation of the franchised business, enter upon the franchised business premises and operate and manage the business, and in doing so, exercise complete authority over its operation. In that event, all revenues from the operation shall be kept separate for the account of the franchisee: cl. 17(7).
- [37] CEFA's rights and remedies on termination are cumulative and the covenants survive termination: cl. 17(8), (9). One of those rights is a right of first refusal to purchase the franchisee's interest in its property and assets relating to the franchised business: cl. 15(1).
- [38] CEFA may bring action and seek injunctive relief to compel the franchisee to comply with its obligations under the franchise agreement: cl. 19(1).

CEFA's Termination of the Franchise Agreements

- [39] The events leading up to CEFA's termination of the Franchise Agreements in August 2018 are as follows.
- [40] The corporate plaintiffs were often late in remitting royalty payments to CEFA, forcing CEFA to make repeated request for payment. When CEFA sent one of those requests by email to Mr. Leslie on August 24, 2018, to its surprise, it received an automatic reply stating: "Please note that this email address will no longer be checked". Later that day, CEFA received an email from the plaintiffs' lawyer advising that they were terminating the Franchise Agreements effective immediately. The basis of the termination was said to be set out in an attached draft notice of civil claim seeking rescission based upon alleged intentional, fraudulent misrepresentations made by certain former senior executives of CEFA as well as Ms. Beim made at least three years prior, between December 2014 and June 2015.

- [41] The alleged misrepresentations pleaded in the draft notice of civil claim concerned CEFA's financial well-being, its licensing approvals in Canada, and the absence of lawsuits against CEFA. There is also an allegation in the draft notice of civil claim that CEFA misused funds paid by franchisees into a brand fund maintained by CEFA for marketing.
- [42] It is highly significant that there is no allegation of misrepresentations concerning Ms. Beim's educational background, work experience, and her degrees in the plaintiffs' original draft and filed notice of civil claim. Those allegations surfaced during the exchange of affidavits in preparation for the hearing of this application, and after CEFA demonstrated in affidavit evidence that the financial misrepresentation claim was highly suspect and on a balance of probabilities seemingly without merit since Mr. Leslie and Ms. Jackson had in fact received substantive detailed confidential financial information concerning CEFA extending as far back as 2013, from a former senior executive of CEFA, and had it in hand since at least September 2016, approximately two years before their purported rescission (and more than two years prior to the commencement of this action, which engages consideration of the defendants' laches defence and defences per the Limitation Act, S.B.C. 2012, c. 13).
- [43] The personal plaintiffs do not deny having received that information. Moreover, Ms. Beim deposes that in 2016, Mr. Leslie confronted her with some of that financial information in an effort to cause CEFA to lower its royalty fee charged under the Franchise Agreements. She declined but instead offered to purchase the corporate plaintiffs' franchises (including the Franchise Agreements) if they were unhappy. Mr. Leslie, she deposes, declined and advised he wish to remain with the CEFA brand.
- [44] Thus, Mr. Leslie's evidence in his first affidavit, to the effect that he was not aware of any such financial information regarding CEFA at the time he affirmed the Franchise Agreements (and as guarantor), is incorrect. If Ms. Beim's evidence is correct, then Mr. Leslie met with her in 2016 and ultimately did not pursue any concerns he had about CEFA's financial circumstances, which in turn supports CEFA's alternative submissions concerning its contract affirmation defences. In that respect, CEFA submits that if there is any merit to the plaintiffs' claims concerning financial misrepresentations, that it has established a significant impediment to the plaintiffs' rescission claim on the basis that the plaintiffs repeatedly affirmed the Franchise Agreements after being provided with detailed confidential financial information by at least August 2016.
- [45] I will also observe, without making any findings, that CEFA's affirmation defences includes allegations that the plaintiffs' conduct in continuing to use CEFA's proprietary information and trade secrets since delivering their notice of rescission constitutes repeated affirmation of the Franchise Agreements.

[46] Although the plaintiffs assert other misrepresentations concerning the brand fund and litigation, the mainstay of the plaintiffs' rescission claim (as advanced on the application) therefore currently rests upon allegations that Ms. Beim and senior employees of CEFA intentionally and fraudulently misrepresented Ms. Beim's educational background, teaching credentials, and university degrees.

Additional Facts Concerning CEFA's Counterclaim

[47] During the week following delivery of the plaintiffs' rescission notice, CEFA and Ms. Beim learned that Mr. Leslie and Ms. Jackson had been planning for months to convert their CEFA schools into competing businesses. At para. 96 of his first affidavit, Mr. Leslie admits that he was taking steps towards rebranding should he elect to notify CEFA of "our decision to rescind the Franchise Agreements on the basis of false representations made to us prior to entering into those agreements."

[48] In fact, the corporate plaintiffs and Mr. Leslie commenced de-branding and opened up schools on the same premises, in competition with CEFA, under the name "Rothewood Academy" before delivering the notice to rescind to CEFA.

[49] Mr. Leslie registered the domain name "rothewood.com" in May 2018. In July 2018, he took steps to advertise positions at the Academy and prepared promotional materials under the Rothewood Academy brand. In early August 2018, before the rescission notice was sent to CEFA, the corporate plaintiffs notified staff of the switch to Rothewood Academy.

[50] Once CEFA learned of some of the plaintiffs' de-branding activities, it delivered notice to them on August 28, 2018, terminating the Franchise Agreements and invoking its contractual right to purchase the assets of the Schools at fair market value. CEFA also demanded that the plaintiffs immediately cease their de-branding activities and advised that it reserved its right to seek injunctive relief. CEFA's signs were still up at the Schools when CEFA served its notice of termination.

[51] In the face of this notice, the plaintiffs nonetheless escalated their de-branding activities. They removed the CEFA signs at the Schools and installed new signs in the name of Rothewood Academy and advised parents of the name change. I accept CEFA's submission that the Curriculum continues to be used by Rothewood Academy as well as its proprietary structures.

[52] As part of its de-branding efforts, Rothewood Academy advised parents in a written information update that they "will still offer the excellent curriculum that you are used to" pending creation of new curriculum once they hire a curriculum manager:

Dear Parents,

We are excited to announce our new name of Rothewood Academy. Our new name reflects our move to a family owned academy that is focused educating the whole child from a holistic approach

At Rothewood Academy we are dedicated to continuing to grow and improve upon our already exceptional curriculum and to further that goal we are investing in a dedicated curriculum manager to ensure that teachers get the support they need and the curriculum is kept to the highest standards.

The schools will continue to operate in their current structures and all of our teachers and principals will remain unchanged and all of your contacts will remain unchanged with the exception that emails now end in @rothewood.com. There is no change in ownership.

FREQUENTLY ASKED QUESTIONS (FAQ)

Q: Will curriculum change?

A: We will still offer the excellent curriculum that you are used to but we will be investing in more support, training and curriculum development than has ever occurred before. We are hiring a curriculum manager whose job it will be solely to train teachers, oversee development and create new curriculum.

[Emphasis added]

[53] Evidence from the current principal from the Rothewood Academy at Morgan Crossing and the recently hired curriculum manager establishes that Rothewood Academy is continuing to use the Curriculum and is using it as a platform on which to base a new curriculum for Rothewood Academy.

[54] Further, a comparative analysis undertaken by Ms. Beim, in her first affidavit, of Rothewood Academy's description of its curriculum on its website with the information published on CEFA's website demonstrates that in key areas the former is nearly identical with the latter.

[55] I am also satisfied that CEFA has established a prima facie case, from the information Ms. Beim obtained from Rothewood Academy's website, that Rothewood is using some or all of a special curriculum called "STEM" curriculum that Ms. Beim developed, and which is proprietary to CEFA, that Mr. Leslie obtained in his role with the corporate plaintiffs.

[56] After they received the rescission notice, CEFA and Ms. Beim learned that since at least 2016, the personal plaintiffs had planned to take control of CEFA through a hostile corporate takeover or launch their own competing brand, and have adduced evidence to this effect. Affidavit evidence from the purchaser of CEFA's Langley school deposes that in September 2016, Mr. Leslie and Ms. Jackson attempted to involve them and other CEFA franchisees in a corporate takeover. Mr. Leslie did not disclose his meetings with these individuals until after he was confronted with the affidavit evidence filed as part of CEFA's application. Although Mr. Leslie has since apologized for his failure to make disclosure, he has not addressed the attempted corporate takeover nor has he denied that it was discussed at those meetings.

- [57] Affidavit evidence from Ms. Beim's ex-husband deposes that in July 2016 the (now former) senior CEFA executive who provided the confidential information to Mr. Leslie and Ms. Jackson, sought to have him put financial pressure on CEFA and Ms. Beim by calling his loan to CEFA in order to facilitate a purchase of CEFA by "a friend", since that executive believed that CEFA was not in a position to make the payment. CEFA asks me to infer that the "friend" is Mr. Leslie since the individual involved is the former senior executive who gave CEFA's confidential financial information to him in or around that time. However, it is not necessary for me to make that finding in order to determine the outcome of the application.
- [58] CEFA has also learned, after it received the rescission notice, that Mr. Leslie entered into a lease agreement for a location at Semiahmoo Shopping Centre, located in south Surrey near where the Morgan Crossing school was operated, to operate another school without CEFA's knowledge and consent.
- [59] In support of CEFA's concern for the effect on its reputation, Ms. Beim deposes that CEFA has received inquiries from concerned parents about the reason for the change in name of the Schools to Rothewood Academy and its effect on their children's education.
- [60] In his first affidavit, Mr. Leslie acknowledged the potential value of the Curriculum as an educational platform and as a competitive advantage in the marketplace even though he had developed his own curriculum, since he understood it was developed by an expert in early learning.
- [61] According to CEFA, the corporate plaintiffs have received numerous benefits as a result of the Franchise Agreements and their association with and backing from CEFA and the CEFA Program. The evidence it has adduced on the application is that the Schools have been popular and successful since their inception, with enrolment rates typically over 90%. On that basis, there would be value in the Student Contracts.

The Basis of the Plaintiffs' Rescission Claim

- [62] The main thrust of the rescission claim concerns alleged fraudulent misrepresentations made by Ms. Beim and certain CEFA employees about Ms. Beim's educational background, teaching credentials, and university degrees. They allege that the oral representations were augmented by Ms. Beim and CEFA employees with newspaper and journal articles, a disclosure document provided by CEFA, and information posted on the internet (e.g., through a podcast interview with Ms. Beim and information about her found on CEFA's website). The plaintiffs allege that in spite of very specific representations to the contrary, Ms. Beim never obtained a master's and doctorate from the Universidad de la Republica or a degree or diploma from MIT and was never certified as a teacher in Europe. They assert that they have established on the application that the representations, which they relied upon to enter into the Franchise Agreements and guarantees, are demonstrably false.

[63] In addition to their rescission claim, the plaintiffs assert that CEFA is in breach of the Franchise Agreements in dealing with the payments made by the corporate plaintiffs to the brand fund. Allegations concerning a misrepresentation regarding the brand fund as well as the absence of any lawsuits extant against CEFA are also made. However, from the plaintiffs' oral submissions, it was clear that the thrust of their opposition to the application concerns misrepresentations regarding Ms. Beim's qualifications, degrees, and work experience, and that the relief sought by CEFA is not available to it under the Franchise Agreements.

Determination

[64] CEFA has demonstrated serious issues to be tried and that the balance of convenience supports granting the preservation order that it seeks.

Serious Issues to be Tried

[65] CEFA has established that its claim raises serious issues to be tried in respect of the plaintiffs' claims. With the exception of the issues concerning Ms. Beim's educational background and qualifications, the plaintiffs' reliance on them, and whether CEFA's right to prevent a change in control of the corporate plaintiffs survives termination, which I will discuss momentarily, they are as follows:

- (a) What are the misrepresentations alleged to have been made?
- (b) Were they in fact made to the plaintiffs, and if so, by whom and to whom?
- (c) Were any misrepresentations, if made, done with the knowledge that they were false or reckless as to their truth, with the intention to deceive and induce the plaintiffs to enter into the Franchise Agreements and guarantees?
- (d) Were the misrepresentations, if made, material to the substance of the Franchise Agreements?
- (e) Did the plaintiffs rely on any misrepresentations, if made, and induced to enter into the Franchise Agreements as a result?
- (f) Did the plaintiffs affirm the Franchise Agreements or are they otherwise barred from pursuing any of their claims due to laches or the Limitation Act?
- (g) Do the plaintiffs come to court without clean hands (in respect of pre-litigation conduct as well as before the Court) so as to disentitle them to relief?
- (h) Are the plaintiffs liable for breach of confidence and for continuing to use CEFA's proprietary information and trade secrets without authority?

[66] CEFA has presented what I am satisfied is reliable evidence, from affidavits filed in support of the application together with admissions from affidavits tendered on behalf of the plaintiffs, establishing that the corporate plaintiffs have breached the Franchise Agreements and that they and the personal plaintiffs continue their unauthorized use of proprietary

information and trade secrets, giving CEFA the right to terminate the Franchise Agreements and to pursue its contractual rights available to it consequent upon termination, including the right to purchase the Schools' assets at fair market value.

- [67] Insofar as the plaintiffs' case is concerned, despite the very able submissions of their counsel, I remain concerned about the specificity and consistency of the evidence tendered on behalf of the plaintiffs regarding the alleged misrepresentations, when the plaintiffs discovered them, the nature of any reliance on representations and upon which ones, whether there was an intention to deceive, and whether any representations, including those concerning Ms. Beim's educational experience, degrees, and teaching qualifications, induced the plaintiffs to enter into the Franchise Agreements or were material to their substance: see, e.g., *Catalyst Pulp and Paper Sales Inc. v. Universal Paper Export Company Ltd.*, 2009 BCCA 307 at paras. 55-61; *Kelemen v. El-Homeira*, 1999 ABCA 315 at paras. 5, 18-19. These concerns affect my view of the reliability of the evidence adduced on behalf of the plaintiffs and the merits of the plaintiffs' misrepresentation allegations, at least insofar as this application is concerned.
- [68] On the other hand, in addition to establishing serious questions to be tried that engage injunctive relief, CEFA's evidence on the application points directly to the plaintiffs' potential inability to seek the equitable remedy of rescission due to misconduct, lack of clean hands, affirmation, and failing to pursue any remedy with promptitude: *Alex v. Tiede*, [1986] 5 W.W.R. 599 (Man. Q.B.) at para. 54; *Logan v. Williams* (1989), 41 B.C.L.R. (2d) 34 (C.A.) at para. 18; *Louie v. Lastman*, [2002] 61 O.J. (3d) 459 (C.A.) at para. 19; *Jacques v. Brown*, 2004 MBQB 86 at paras. 22-26; *Panzer v. Zeifman* (1978), 20 O.R. (2d) 502 (C.A.) at para. 24; *Samson v. Lockwood*, 40 O.R. (3d) 161 (C.A.) at para. 54; *Brown & Root Services Corp. v. Aerotech Herman Nelson Inc.*, 2004 MBCA 63 at paras. 54-56.
- [69] The plaintiffs have not proven, as they assert they have, at least not at this stage, their claim for fraudulent misrepresentations concerning Ms. Beim's educational background, university degrees, and teaching qualifications. The evidence is not to the effect characterized by the plaintiffs. Contrary to the plaintiffs' submissions, Ms. Beim does not admit that she failed to earn university degrees, let alone does she admit to any other alleged misrepresentations. She and CEFA deny all of the alleged misrepresentations. In respect of the education misrepresentations, Ms. Beim's evidence is that she both completed all of the prerequisites necessary for her masters and doctorate degrees and obtained them. The plaintiffs have not proven fraud on her evidence. Furthermore, the plaintiffs have not established, as they said at one point in their submissions that they have, that CEFA's defence and counterclaim are bound to fail.
- [70] The plaintiffs have, however, raised numerous valid substantive questions and factual issues to be tried about Ms. Beim's educational experience and degrees. Yet, and as previously noted, CEFA has raised serious issues to be tried in respect of the plaintiffs' reliance on any purported misrepresentations. In addition to its lack of any nexus to the substance of the contract submissions, CEFA relies on the dicta in *Mayer v. Osborne Contracting Ltd.*, 2012

BCCA 77, where, at para. 86, the Court of Appeal said, in respect of a party seeking equitable relief, which includes rescission, that there must be a direct and necessary connection between the misconduct and relief sought:

Thus, the relationship between the relief sought and the misconduct must be direct and necessary in the sense that the person seeking equitable relief must be required to rely on the misconduct in order to vindicate his claim.

- [71] These factual and legal issues will undoubtedly be explored at examination for discovery and challenged at trial in cross-examination, all in the context of whether any such misrepresentations, if made, induced the plaintiffs to enter into the Franchise Agreements, go to the substance of the Franchise Agreements, and are direct and necessary to the rescission claim. While these issues are all serious issues to be tried, the plaintiffs have not established that Ms. Beim and CEFA have come to court without clean hands.
- [72] I also respectfully disagree with the plaintiffs' submission that CEFA is attempting to tie up the assets of the Schools and prevent a change in control of the corporate plaintiffs based on Ms. Beim's evidence concerning her educational background and degrees. That is not the basis of CEFA's application.
- [73] To conclude on this issue, the questions raised by the plaintiffs concerning the nature and veracity of Ms. Beim's evidence concerning her educational background and degrees are not a basis to deny the relief sought by CEFA on this application.
- [74] CEFA's application to prohibit a change in control of the corporate plaintiffs, which in submissions they said would be through a dissipation or encumbrance of 40% or more of the shares of the corporate plaintiffs, also raises a further serious issue to be tried, i.e., whether its contractual rights to prohibit a change in control of the corporate plaintiffs without its consent and right of first refusal to purchase those shares survive termination of the Franchise Agreements.
- [75] Its claim is grounded in cl. 15(6) and 17(8) and (9) of the Franchise Agreements.
- [76] As previously mentioned, cl. 15(6) states that if a franchisee, such as the corporate plaintiffs, is a corporation, partnership, or other entity, a transfer of shares which would affect or result in a change of control of the majority or block of 40% or more of the voting or equity interest is subject to the assignment provisions. Those provisions require CEFA's prior consent to assignment and provide CEFA with a right of first refusal to purchase. Clause 17(8) states that CEFA's rights and remedies are cumulative such that no exercise or enforcement by CEFA shall preclude the exercise or enforcement of any other right or remedy.
- [77] Clause 17(9) provides that all covenants and agreements to be performed or observed by the franchisee and/or guarantor shall survive the expiration or termination of the agreement:

Survival of Covenants

- (9) Notwithstanding the expiration or termination of this Agreement for any reason whatsoever, all covenants and agreements to be performed and/or observed by the Franchisee and/or the Guarantor under this Agreement or which by their nature survive the expiration or termination of this Agreement, including without limitation, those set out in Subsections 9, 14(2), 17(2), 17(3), 17(4), 17(5), 17(6) and 18 hereof shall survive any such expiration or termination.

[Emphasis added]

- [78] In my opinion, the question of whether CEFA's rights to prevent an assignment or sale of control of the corporate plaintiffs without its consent and its right of first refusal survive termination of the Franchise Agreements in the circumstances of this case is a serious issue of contractual interpretation to be determined at trial.
- [79] The plaintiffs cited 2176693 Ontario Ltd. v. Cora Franchise Group Inc., 2015 ONCA 152 and Shelanu Inc. v. Print Three Franchising Corp., 2003 CanLII 52151 in support of their submission that ambiguities in the Franchise Agreements should be interpreted against CEFA since they are contracts of adhesion. I am not persuaded that any ambiguities arise, and instead view the issue of CEFA's rights following termination of the Franchise Agreements to be a matter of contract interpretation based on the plain language of the contracts. In any event, the purported ambiguities raised by the plaintiffs in submissions, even if determined to exist, do not overcome the very serious issues to be tried established by CEFA so as to deny it the relief sought.

Balance of Convenience

- [80] In terms of the balance of convenience, CEFA is clear that it intends to purchase the Schools' assets and the franchised businesses themselves if possible. If the injunction is not granted, there may be no assets left for CEFA to purchase if it is successful at trial. If CEFA's rights to prevent a change in control per cl. 15 survive termination, it would be rendered nugatory if the plaintiffs effected a change in control of the corporate plaintiffs before its claim to those rights is determined at trial. Its contractual rights will be moot. Injunctive relief to preserve the assets, status quo, and control of the corporate plaintiffs will also avoid further disruption of the parties' contractual relationship. Thus, injunctive relief is necessary so as not to deprive CEFA of its contractual rights and to ensure that key subject matters of the litigation are preserved: *City of London v. Talbot Square Ltd.* (1978) 22 O.R. 21 (Div. Ct.) at 29).
- [81] CEFA has also satisfied this part of the test.

Irreparable Harm

- [82] The balance of convenience analysis also partly addresses the issue of irreparable harm. Since the Schools' assets include CEFA's proprietary information and trade secrets, their dissipation (if the injunction is not granted), and hence, CEFA's loss of its contractual rights, including its right to purchase, may also impact upon its reputational interests, valuation of the loss is not possible at this time, which in turn supports CEFA's claim to irreparable harm: Cappuccino at para. 31.
- [83] Likewise, the continued use of CEFA's proprietary information and trade secrets is to the financial and potentially reputational detriment of CEFA and is incapable of valuation at this time.
- [84] To date, the plaintiffs have not returned CEFA's manual and any of its confidential and proprietary information. I agree with CEFA that in view of the evidence concerning Mr. Leslie's stated intention on several occasions to run his own franchise system, there is a risk that he may seek to franchise Rothewood Academy schools and with them, the Schools' assets and some or all CEFA's proprietary information and trade secrets.
- [85] The plaintiffs have not provided any undertaking or other assurance that the Schools' assets will be preserved and that there will be no change of control pending the determination of this action.
- [86] The plaintiffs' evidence also suggests that they may lack the resources to satisfy CEFA's claim (in its counterclaim, which includes a claim for recovery of unpaid royalties of approximately \$90,000).
- [87] Impediments to the plaintiffs' ability to satisfy any judgment are amplified by evidence that Mr. Leslie is defending litigation (with trial set for April 2019) brought by the purchaser of the Langley School, and that he is one of the subjects of an investigation into criminal fraud relating to contracts between the Ministry of Children and Family Development and the CEFA schools he operated.
- [88] On the other hand, CEFA's current financial information demonstrates that the plaintiffs are adequately protected by CEFA's proposed undertaking to pay damages.
- [89] There is no evidence that granting the preservation order sought by CEFA will cause the plaintiffs to suffer irreparable harm. In fact, the only harm they would suffer is an inability to sell the Schools' assets and the shares of the corporate plaintiffs pending the outcome of trial, which is proceeding on an expedited basis. The corporate plaintiffs can continue to operate the Schools and retain the revenue and profits to operate in the ordinary course of business.
- [90] Thus, CEFA has satisfied the irreparable harm test.

Conclusion

- [91] The relief sought by CEFA in its amended notice of application dated and filed November 29, 2018, concerning the Schools' assets is granted. I order that the plaintiffs shall not dispose of, encumber, or dissipate any of the Schools' assets.
- [92] It was drawn to my attention in submissions that CEFA does not have a list of the Schools' assets. Assets are defined in the Franchise Agreements to include Student contracts in force at the time of termination as well as student and client lists. Assets would also include furniture and other chattels, computer equipment and software, art, communications and other equipment necessary to operate the Schools. In the absence of evidence, it was not clear to me from submissions whether the Student contracts with CEFA were month to month or were still in force at the date of termination. To ensure there is clarity of the scope of this order, I order the plaintiffs to deliver to CEFA within 30 days a list of all of the Schools' assets.
- [93] My order also applies to licenses and permits utilized by the plaintiffs in the conduct of the Schools' business that are capable of being transferred or assigned, since they would be transferred to CEFA upon payment of the purchase price of the assets.
- [94] CEFA does not seek to include in the ambit of the order the property leases entered into by the corporate plaintiffs to operate the Schools.
- [95] I also grant the relief sought by the defendants to prevent a change in control of the corporate plaintiffs. My order prohibits the plaintiffs from disposing of or encumbering 40% or more of the voting shares of the corporate plaintiffs.
- [96] My order shall remain in force pending determination of the issues raised in the plaintiffs' claim and CEFA's counterclaim in this action, or by further court order.

"Walker J."

The Honourable Mr. Justice Walker

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