COURT OF APPEAL FOR ONTARIO

CITATION: Fairview Donut Inc. v. The TDL Group Corp., 2012 ONCA 867
DATE: 20121207
DOCKET: C55239

MacPherson, Armstrong and Hoy JJ.A.

BETWEEN

Fairview Donut Inc. and Brule Foods Ltd.

Plaintiffs (Appellants)

and

The TDL Group Corp. and Tim Hortons Inc.

Defendants (Respondents)

Jerome Morse, Lori Stoltz and John Adair, for the appellants

Peter Howard and Danielle Royal, for the respondents

Heard and released orally: December 6, 2012

On appeal from the judgment of Justice Strathy of the Superior Court of Justice, dated February 24, 2012.

ENDORSEMENT

[1] The appellants, franchisees of the respondents, commenced a proposed class action against the respondent franchisors for several different causes of action, including breach of contract, misrepresentation, unjust enrichment, violations of the *Competition Act*, and breach of the duty of good faith (fair dealing).

[2] Following a two-week combined certification and summary judgment motion, the motion judge, Strathy J., concluded that certification of a class action would be appropriate for a number of issues, but that none of the proposed claims could possibly succeed. Accordingly, he granted the respondents' motion for summary judgment and dismissed the action.

[3] The appellants contend that the motion judge erred by granting summary judgment on two of the appellants' claims, namely, breach of contract and breach of the duty of good faith.

[4] On the contract claim, the appellants contend that Tim Hortons breached s. 7.03 of the franchise agreement by: (1) requiring franchisees to purchase Always Fresh ingredients (par-baked donuts) at commercially unreasonable prices when it converted to a new donut production system, thereby diminishing the profitability of such items; and (2) requiring franchisees to sell Lunch Menu items at unprofitable prices.

[5] We did not call on the respondents to address this issue in oral argument. In our view, the motion judge was correct to view this as an issue that could be resolved on a summary judgment basis. Moreover, we agree completely with his analysis of s. 7.03 of the Franchise Agreement, and especially this conclusion:

> [I]t would be unreasonable to interpret section 7.03 as meaning that every new method or new product introduced into the Tim Hortons System and the Confidential Operating Manual must be profitable in its

> own right. The franchisor is entitled to consider the profitability and prosperity of the system as a whole.

[6] We reach the same conclusion on the appellants' claim of breach of the duty of good faith, which is linked to the breach of contract issue. In our view, the motion judge carefully and comprehensively reviewed the record on this issue which strongly documented the extent and fairness of Tim Hortons' process for considering their franchisees' position with respect to the transition to a new donut production system. We agree with the motion judge's conclusion on this issue:

> It has been established beyond dispute that the Always Fresh Conversion was a rational business decision made by Tim Hortons for valid economic and strategic reasons, having regard to both its own interests and the interests of its franchisees. The evidentiary record provides ample support for the conclusion that scratch-banking was unsustainable in the long run and that the move to Always Fresh baking was beneficial for franchisees.

[7] We acknowledge that the appellants' proposed class action is a large one, with a massive documentary record, and, potentially, a great deal of money at stake. However, in the end we agree with the motion judge that it was appropriate for resolution on a summary judgment basis. As he said:

> At its core, this case is not complex. True, the plaintiffs have amassed a huge record and the defendants have added their share to the pile. True, there are some conflicts in the evidence, but many of those conflicts are irrelevant to the issues. This is not a case in which it is

> necessary to make multiple findings of fact or to make findings of credibility.

[8] The appeal is dismissed. The respondents are entitled to their costs of the appeal fixed at $125,000 inclusive of disbursements and applicable taxes.

"J.C. MacPherson J.A."
"Robert P. Armstrong J.A."
"Alexandra Hoy J.A."