909787 Ontario Ltd. v. Bulk Barn Foods Ltd.

Ontario Judgments

Ontario Superior Court of Justice

Divisional Court

O'Driscoll, Somers and Thompson JJ.

Heard: May 17, 2000.

Judgment: October 3, 2000.

Div. Court File No. 526/99

Court File No. 50261-98

[2000] O.J. No. 3649 | *138 O.A.C. 180* | *2 C.P.C. (5th) 61* | *99 A.C.W.S. (3d) 919*

Between 909787 Ontario Limited, plaintiff (respondent), and Bulk Barn Foods Limited, defendant (appellant)

(29 paras.)

Case Summary

Practice — Persons who can sue and be sued — Individuals and corporations, status or standings — Class actions, certification, considerations (incl. when class action appropriate) — Class actions, appeals — Franchises — Franchise agreement.

Appeal by the defendant, Bulk Barn Foods, from an order certifying this action brought by 909787 Ontario as a class proceeding. Bulk Barn was engaged in the franchising of bulk food stores in Ontario and the Maritimes. The numbered company was a franchisee of Bulk Barn operating in Richmond Hill. It alleged that Bulk Barn breached its contractual obligation to supply products priced at a level generally charged by other competitive suppliers in the general market area. It also alleged that Bulk Barn was a purchasing agent for all franchisees and as such was in a fiduciary relationship with the franchisees. It alleged that by overcharging, Bulk Barn breached its fiduciary duty. Bulk Barn bought supplies for itself and then sold them to individual stores in accordance with a price list. In purchasing the supplies, it did not bind the franchisees to the purchase. Doshi, the president of the numbered company, sent a memorandum to Bulk Barn alleging that 150 items being sold to the franchisees were overpriced. Bulk Barn immediately called a meeting of the franchisees and adjusted some prices. Doshi claimed that the prices were reduced for a while but then rose again. He sought to have the numbered company represent the interests of all Bulk Barn franchisees.
HELD: Appeal allowed.

None of the usual hallmarks of a principal-agency relationship were present between Bulk Barn or the franchisees. No fiduciary relationship was established and the action should not have been certified on that basis. No common cause of action on a contractual basis was established.

Prices for the franchisees in the different areas would differ. In order for each person to become a member of the class, he or she would have to succeed in showing not just what the charge was for a given commodity but that it was available locally from other suppliers at a lower price. Such an action would be unmanageable.

Statutes, Regulations and Rules Cited:

Class Proceedings Act, *S.O. 1992, c. 6, s. 5*(1).

[Quicklaw note: Supplementary reasons for judgment were released November 7, 2000. See *[2000] O.J. No. 4244*.]

Counsel

Michael McGowan and Kirk Baert, for the plaintiff (respondent). Larry P. Lowenstein, Tara James and Joe Starkman, for the defendant (appellant).

The judgment of the Court was delivered by

SOMERS J

1 This appeal from the Order of The Honourable Mr. Justice John Jenkins dated September 13, 1999 in which he certified this action as a class proceeding under the Class Proceedings Act, 1992, reaches this Court pursuant to leave to appeal ordered by Madam Justice Dunnet October 15, 1999.

2 The plaintiff in this action is a privately owned company carrying on business as a retailer of bulk food in the town of Richmond Hill. The defendant company is engaged in the franchising of retail stores under the name of Bulk Barn Foods in Ontario and in two of the Maritime Provinces. The plaintiff has been a Bulk Barn franchisee since September 25, 1990 when it signed a franchise agreement with the defendant company. A second franchise agreement was signed by the plaintiff on October 17, 1996.

3 There are some eighteen (18) Bulk Barn stores located in what is described as the Greater Toronto Area. This includes Pickering, Newmarket, Dixie, Woodbridge and Brampton, as well as stores actually located in Metropolitan Toronto. Thirteen (13) other Bulk Barn stores are located in Western Ontario stretching between Sarnia and Windsor to Kitchener, St. Catharines, Guelph and Brantford. Six (6) separate Bulk Barn Stores are located in the Hamilton/Burlington area and nine (9) in Eastern Ontario, including stores in Kingston, Belleville, Cobourg and Kanata. The three (3) stores in Northern Ontario are located in Barrie, Sudbury and Owen Sound. There are seven (7) stores in the Maritimes including stores in Dartmouth and Truro, Nova Scotia and Moncton and St. John, New Brunswick.

4 The plaintiff signed its first Franchise Agreement on September 25, 1990. Clause 7.04 of that agreement reads in part:

> Associate Must Offer Approved Brands and Styles - The reputation and goodwill of the Company and its Associates is based upon, and can be maintained and enhanced only

> by the sale of high quality products. The Associate therefore agrees that it shall offer for sale all and only such brands of products, and use all and only such supplies, as are from time to time required or approved in writing by the Company. The Associate will buy from the Company or from such sources or suppliers as shall be approved in writing by the Company (which sources or suppliers may include affiliates of the Company) all such products and supplies.

5 The Franchise Renewal Agreement signed by the plaintiff on October 17, 1996 added to that clause the following words:

> The Company (or its Affiliates as the case may be) reserves the right to realize a reasonable profit or mark up on the supply of such products and supplies, which profit or mark up, will be comparable to those generally charged or realized by other competitive suppliers in the general market area or region in which the Franchised Business is located, taking into account delivery terms, credit terms, product availability on a specific and full-line basis, warehouse and storage costs and similar items.

These two Franchise Agreements were standard throughout the network of franchised stores.

6 The amended Statement of Claim advances claims against the defendant on two bases. The first is that the defendant is alleged to be in breach of its contractual obligation to supply products and supplies which will be priced at a level "generally charged or realized by other competitive suppliers in the general market area."

7 Accompanying each Franchise Purchase Agreement, and circulated throughout the company's store network, were policy manuals which although amended from time to time, contained clauses which stated "the company will always strive to provide the product at a price lower than any other wholesaler on the street. If the franchisee should ever uncover an item being offered for sale at a price lower than ours, please bring it to our attention immediately so that we can review the situation." This policy in different words was reiterated from time to time as the manual went through amendments. For example, a comparable paragraph in the manual issued in February 1996 read as follows:

> The Company will always strive to provide a quality product which on an "everyday" basis is at a price as low as or lower than other wholesalers. However it should be noted that this would not always apply in cases where other wholesalers are offering one time monthly specials "clear out" deals etc. etc.
>
> If a franchisee should discover an item being offered for sale consistently at an every day price which is lower than ours, it should be brought to the attention of the corporate office immediately, along with the following details:
>
> a) name of supplier;
>
> b) contact name;
>
> c) telephone number.
>
> The corporate office will investigate all such reported situations immediately.

8 This section of the policy manual and the provisions of paragraph 7.4 of the Franchise and Franchise Renewal Agreements are the ones which are said by the plaintiff to have been breached by the defendant.

9 The second basis of the plaintiff's claim against the defendant is the allegation that the defendant is a Purchasing Agent for the plaintiff and all of the other Bulk Barn stores, and as such, was and is in a fiduciary relationship with the stores. By the alleged overcharging, the defendant is claimed to have breached that relationship.

10 Paragraph 5(1) of the Class Proceedings Act *S.O. 1992, c. 6* requires under ss. (a) that the court certify a class proceeding if "the pleadings or the Notice of Application discloses a cause of action." The claim on the grounds of breach of fiduciary relationship has a curious history in this action. As the learned judge of first instance noted in his reasons on page 6:

> Upon the delivery of the Statement of Claim, the defendant launched a Rule 21 motion alleging that the Statement of Claim failed to disclose the cause of action. I heard this motion on March 3, 1999. I permitted the claim for breach of contract to stand. I struck the claim based on a breach of the fiduciary duty and permitted the plaintiff leave to amend.
>
> The amended Statement of Claim alleges a breach of fiduciary duty, which was not challenged on a further Rule 21 motion by the defendant. I find that it is not "plain and obvious" that the plaintiff's amended Statement of Claim discloses no cause of action respecting a breach of a fiduciary duty.

11 Counsel for the defendant advised the court that in view of the future proceedings that appeared to be looming involving this case, he had decided to argue this second fiduciary breach allegation on the motion to certify the action as a class proceeding, rather than bring yet another motion under Rule 21.

12 It is clear on the facts of this case, including the wording of the Franchise Purchase Agreement itself, that Bulk Barn buys its supplies for itself and then sells them to the individual stores in accordance with a price list, which it supplies. In purchasing the supplies, it in no way binds any of the franchisees to that purchase. Neither do the franchisees or any of them purport to control the contracts through which Bulk Barns obtains its supplies.

13 In the Nova Scotia Court of Appeal case of Scott et al. v. Trophy Foods Inc. *(1995), 123 D.L.R. (4th) 509*, the court reversed a lower court decision finding a food broker's fiduciary duty to one of its suppliers. It held that for a true agency relationship to exist the agent must have the power to bind the principal and affect the principal's legal position. Such power was not available to the defendant food broker and the alleged agency relationship was held not to exist. Hallett J.A. speaking for the court said at p. 528.

> The court should ask itself considering all the circumstances of a business relationship and in particular the terms of a contract entered into between the parties, whether the court should impose obligations on one of the parties over and above the terms of the contract. In my opinion, the court should only do so if the degree of vulnerability of the other party is so great that in all good conscience the court should intervene. This broad

> principle was recognized by the court's reluctance to impose so-called fiduciary duties in other than the traditional relationships.

14 Hallett J.A. said earlier in the same case at p. 525 when dealing with the case of LAC Minerals Ltd. v. International Corona Resources Ltd., *[1989] 2 S.C.R. 574*:

> The LAC Minerals judgment sends a signal to the courts that they should be slow to impose fiduciary duties on a party every time a court perceives a breach of trust or confidence particularly where the relationship between the parties is not one of the traditional relationships giving rise to fiduciary duties (i.e. trustees and beneficiaries etc.), and the relationship is between commercial entities governed by the terms of a contract.

15 Here none of the usual hallmarks of a principal-agency relationship were present in the Bulk Barn - Franchisee Agreement. So far as the acquisition of supplies was concerned, theirs was one of vendor - purchaser. Accordingly, we are of the view that the learned trial judge erred in certifying this action on the basis of the existence of a fiduciary relationship and that portion of the appeal is therefore allowed.

16 The question upon which counsel for the plaintiff's respondent placed greatest emphasis, was based upon the allegation that Bulk Barn has been in breach of its contractual obligation to supply products and supplies at prices comparable to those "generally charged or realized by other competitor suppliers in the general market area or region in which the franchise business is located." In short the plaintiff alleges that the defendant has been overcharging generally throughout its network of franchised stores.

17 As support for this proposition, the plaintiff tendered the affidavit of Mr. Suresh Doshi the President of the Plaintiff's store. In it he testified to two incidents. The first of these occurred in June 1991 when Mr. Doshi wrote to the Bulk Barn President complaining that he had been overcharged for a case of almonds. In a subsequent telephone conversation with an officer of Bulk Barn, Mr. Doshi indicated that he could "go down the street and buy almonds from another vendor." Whether or not this product was available elsewhere at a better price was not disclosed in any of the material.

18 The second incident occurred in August 1995. On that occasion Mr. Doshi sent a memorandum to the President of Bulk Barns alleging that some 150 items being sold by the Company to its franchisees were overpriced. The Company's response was immediate. The President called a meeting of all of the franchisees, the subject of which according to the notice sent to them, was "the cost prices of product delivered to your store." The notice went on to state:

> During the second week of August one of our franchisees provided us with our order book detailing some 150 items being sold to independent bulk food stores (not Bulk Barn locations) at cost prices that are considerably lower than those out of Leek Crescent. As I hope you will appreciate, we have been working very hard in this area since the information was brought to us in detail and there is no question that there are several categories where we were out of line with wholesale prices on the street.

19 The affidavit of Mr. Doshi stated that the prices of supplies to his store thereafter were reduced, but after a period of time, went back up again. No examples or specifics of any of this are given in any of the material.

20 Paragraph 5(1) of the Class Proceedings Act establishes five separate criteria, which must be met before the court will certify a class proceeding, in the following words:

> 5-(1) the court shall certify a class proceeding on a motion under s. 2, 3 or 4 if:
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> (a) the pleadings or the notice of application discloses a cause of action;
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> (b) there is an identifiable class of two or more persons that would be represented by the representative plaintiff or defendant;
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> (c) the claims or defences of the class members raise common issues;
>
> (d) a class proceeding would be the preferable procedure for the resolution of the common issues; and
>
> (e) there is a representative plaintiff or defendant who:
>
> (i) would fairly and adequately represent the interest of the class;
>
> (ii) has produced a plan for the proceeding that sets out a workable method of advancing the proceeding on behalf of the class and of notifying class members of the proceeding; and
>
> (iii) does not have on the common issues for the class an interest in conflict with the interest of other class members.

21 The issues as defined in the formal order issued by John Jenkins J. were:

> (a) the defendant's liability for overcharging on the inventory supplied to class members; and
>
> (b) defendant's liability for, and the quantum of, compensatory damages are common issues for the class.

22 While it is easy and convenient to state that the class proposed in this action is a small one - the owners of the 56 stores in the network, it is by no means clear that there is a common cause of action disclosed in the pleadings or notice of application. The two incidents relied on - one eight years ago and the other five years ago, coupled with the "admission" allegedly contained in the August 31, 1995 notice from Mr. Ofield to the franchise owners, do not appear sufficient to form the basis for a legitimate cause of action.

23 The June 1991 incident simply recites a statement by Mr. Doshi that he told the Company president that he could go down the street and buy almonds at a better price. Nothing in the material suggests that this was so.

24 The August 1995 incident illustrates the correct operation of the contract which required a franchisee to notify the parent company when a price discrepancy was discovered. According to

the terms of the contract, the Defendant Company, upon being so notified was to review and investigate the situation. In this instance, the franchisee notified the Defendant Company of apparent price discrepancies, the Defendant Company investigated the situation and as a result summoned a meeting of all franchises to discuss the situation. The evidence is that for a period of time - unspecified - there was a reduction in price - this in time was followed by an increase. No specifics were provided.

25 There also appears to be a failure to satisfy the requirement to establish an identifiable class of two or more persons. The network of stores as has been noted is spread out over a substantially large geographical area in Canada. The wording of the contract ties the whole question of comparable price to those "generally charged or realized by other competitive suppliers in the general market area or region in which the franchise business is located." There was no evidence before the court and certainly no reason to expect that local prices would be the same in St. John, New Brunswick as they would in Sarnia, Ontario or for that matter within a large heavily populated area such as the Greater Toronto area or the Hamilton/Burlington area. The possible differences in each locale raise the very distinct possibility that there are no common issues which can be manageably tried together and which will advance the litigation.

26 In dismissing an appeal from the Divisional Court which had reversed an Order certifying a class proceeding claiming nuisance for alleged noxious vapours over a 16 square mile area inhabited by some 30,000 people Carthy J.A., speaking for the court said in Hollick v. City of Toronto *(1999), 46 O.R. (3d) 257* at 264:

> I see no error in looking beyond the pleadings and to the evidence presented to assist in the application of the criteria set out in s. 5(1)(b)(c) and (d). If it were otherwise, any Statement of Claim alleging the existence of an identifiable group of people would foreclose further consideration by the court. Similarly, the mere allegation that the class action is the preferable procedure would prevent the court from making its own assessment of the evidence under s. 5(1)(b).

27 He went on to say at p. 266:

> It follows that liability for nuisance in the present case in favour of any individual property owner or resident, can only be established by evidence that the particular individual personally suffered sensible discomfort or evidence that emissions from the defendant's premises have interfered with the reasonable enjoyment of their properties.

Further, p. 267 he said:

> Every incident complained of would have to be separately examined together with its impact upon every household and a conclusion reached as to whether each owner or occupier had been impacted sufficiently, that a finding of nuisance is justified. To add to the already impossible task, complaints of owners are by their nature subjective and thus would have to be individually assessed in order to ascertain whether emissions from the respondent's site had materially affected each class member's enjoyment of property or caused personal discomfort justifying compensation.
>
> No common issue other than liability was suggested and I cannot devise one that would advance the litigation.

28 In his reasons, Carthy J.A. approved the statement made by Winkler J. in Mouhteros v. DeVry Canada Inc. *(1998), 41 O.R. (3d) 63* an action based upon alleged misrepresentations by the defendant as to the quality of the programs and facilities it offered at its educational institution. He said at p. 73:

> The presence of individual issues will not be fatal to certification, indeed virtually every class action contains individual issues to some extent. In the instant case however, what common issues there may be are completely subsumed by the plethora of individual issues which would necessitate individual trials for virtually every class member. Each student's experience is idiosyncratic and liability would be subject to numerous variables for each class member. Such a class action would be completely unmanageable.

In our view, the same problem would exist in a class action based upon the allegations in this case. In order for each person to become a member of the class, he or she must succeed in showing not just what the charge was for a given commodity or a list of commodities supplied to them by Bulk Barn at specified times, but that it was available locally from other suppliers in their area at a lower price. In our view an action of this sort would be completely unmanageable. It follows that in our opinion the appeal must be allowed and the order of John Jenkins J. certifying this case as a class proceeding be set aside.

Costs

29 The plaintiff respondent will pay to the defendant applicant its costs of this appeal forthwith after the assessment thereof.

O'DRISCOLL J.
SOMERS J.
THOMSON J.
