

DATE: 20090626  
DOCKET: M37649 M37582

COURT OF APPEAL FOR ONTARIO

Goudge J.A. (In Chambers)

BETWEEN

2038724 Ontario Ltd. and 2036250 Ontario Inc.

Respondents

And

Quizno's Canada Restaurant Corporation, Quiz-Can LLC, The Quizno's Master LLC,  
Gordon Food Service, Inc. and GFS Canada Company Inc.

Moving Parties

Geoffrey B. Shaw, for the moving parties

Allan D.J. Dick, for the respondents

Heard: June 22, 2009

Motion for extension of time to appeal a decision of Justice Paul M. Perell of the Superior Court of Justice dated March 4, 2008.

**Goudge J.A.:**

**INTRODUCTION**

[1] Quizno's Canada Restaurant Corporation, Quiz-Can LLC, and The Quizno's Master LLC (together referred to as Quiznos) move to extend the time to appeal a

decision of Justice Perell made on March 4, 2008, dismissing their motion to stay an intended class action commenced by the respondents on behalf of franchisees of Quiznos. For the reasons that follow, I would not allow the extension of time.

[2] Quiznos moved under Rule 21 to stay the action on the basis that the franchise agreements each contained a provision waiving the franchisee's' right to proceed against Quiznos on a class wide basis and a second revision that was in many of the franchisee agreements giving exclusive jurisdiction over disputes to the courts of British Columbia.

[3] Quiznos initially sought to proceed with the stay motion in advance of the motion for certification of the class action. On March 28, 2007, Justice Hoy, the case management judge, adjourned the stay motion (which at that time was based only on the "no class action" provision) and directed that it be determined together with the certification motion to "hopefully minimize litigation by instalments". As a result, the stay motion and the certification motion were heard together by Justice Perell. He dismissed both on March 4, 2008.

**b. The Appeals**

[4] Apart from s. 6(2) of the *Courts of Justice Act*, R.S.O. 1990, c. C.43, the appeal route for the dismissal of a stay motion is to this court. The appeal route for the dismissal of a certification motion is to the Divisional Court. Section 6(3) allows transfer of the latter appeal to this court if, in the same proceeding, the former appeal is taken.

[5] On April 3, 2008, Quiznos served the respondents with a notice of appeal to this court from the dismissal of their stay motion. Quiznos chose not to file the notice with this court, but indicated to the respondents that they proposed to proceed with the appeal only if the respondents overturned the dismissal of the certification motion in the Divisional Court or, if unsuccessful there, obtained leave to appeal to this court. In response, the respondents invited Quiznos to file their notice of appeal in this court to allow this court, pursuant to s. 6(2) of the *Courts of Justice Act*, to consider the stay appeal and the certification appeal together. Quiznos declined to do so.

[6] This left the respondents to appeal the dismissal of the certification motion to the Divisional Court. On August 27, 2009, they were successful. That court (Justice Swinton dissenting) allowed the appeal and granted the certification order, conditional on a revised litigation plan. In its reasons, the Divisional Court noted that Quiznos had moved unsuccessfully to stay the action, but had not appealed that decision.

[7] Quiznos has now sought leave to appeal the decision of the Divisional Court to this court. At the same time, Quiznos moves before me for an order extending time to appeal from Justice Perell's order of March 4, 2008, dismissing Quiznos' motion to stay the action.

## **ANALYSIS**

[8] Consideration of Quiznos' request to extend time to appeal begins with the applicable rule, rule 61.14(2):

Deemed Abandonment

A party who serves a notice of appeal or cross-appeal and does not file it within ten days after service shall be deemed to have abandoned the appeal or cross-appeal, unless the court orders otherwise.

[9] The considerations germane to the exercise of my discretion have been set out in the jurisprudence of this court. See, for example, *Kefeli v. Centennial College of Applied Arts & Technology* (2002), 23 C.P.C. (5th) 35 (Ont. C.A.); *Frey v. MacDonald* (1989), 33 C.P.C. (2nd) 13 (Ont. C.A.). These considerations are as follows:

- a) whether the appellant (Quiznos) formed a firm intention to appeal within the relevant time period and has maintained it;
- b) the length of the delay and whether the appellant has offered a reasonable explanation for it;
- c) any prejudice to the respondents;
- d) the merits of the appeal;

[10] The overarching principle is simply whether the justice of the case requires that an extension be given. See *Bratti v. Wabco Standard Trane Inc.* (1994), 25 C.B.R. (3d) 1 (Ont. C.A.).

[11] Turning first to Quiznos' intention to appeal, from the beginning that intention has been conditional on the result of the motion for certification. If that motion failed, Quiznos did not intend to proceed with the appeal. In other words, Quiznos might or might not appeal. Only with the recently brought motion to extend time does that intention appear to have become firm.

[12] The delay has been some 15 months. The explanation offered by Quiznos is that the appeal could have become moot if the certification motion failed. Some doubt is cast on the reasonableness of that explanation because even though that is still true (if leave to appeal the certification order is granted and the appeal succeeds), Quiznos appears now to have concluded that this possibility no longer justifies delaying the appeal. That is why it has moved to extend the time to file its notice of appeal.

[13] Equally important is that Quiznos' reason for delaying meant that the certification appeal had to proceed in the Divisional Court separately from the stay appeal. The stay appeal then had to wait for 15 months before Quiznos took steps to proceed with it. That is the kind of litigation by instalments that Justice Hoy warned against in this very case. In an era where it is the responsibility of all participants in the justice system to avoid, if possible, a multiplicity of steps in litigation, in the interest of getting at the merits of disputes, it is not reasonable to delay the stay appeal for 15 months because it might become moot, when the alternative would have been to proceed directly with both appeals and have them heard together on the merits in this court.

[14] The prejudice to the respondents of the 15 month delay is most obvious if Quiznos is denied leave to appeal the decision of the Divisional Court to this court, or if leave is granted but the appeal fails. In that circumstance, the respondents would undoubtedly be reluctant to proceed with the class action until the stay appeal is concluded. This delay would have been unnecessary had the stay appeal been proceeded with 15 months ago.

[15] Similarly, assuming the certification order stands, the merits of the stay appeal are not strong. Quiznos' reliance on the stand alone effect of the "no class action" clause faces case law that says that the effect of arbitration clauses in comparable circumstances should be determined within the certification proceeding, not on a stand alone basis. See *Smith v. National Money Mart Co.* (2005), 258 D.L.R. (4th) 453 (Ont. C.A.). Similarly, Quiznos' reliance on the exclusive jurisdiction clause faces case law that says that such clauses can be overridden if there is a strong reason to do so. Arguably, a certification order provides that reason. See *Z.I. Pompey Industrie v. ECU-Line N.V.*, [2003] 1 S.C.R. 450.

[16] If, on the other hand, the certification order is set aside in this court so that no action can proceed on a class basis, the stay appeal becomes irrelevant. The justice of the case would then not require that time be extended to proceed with it.

**CONCLUSION**

[17] In summary, I conclude that Quiznos has not had a firm intention to appeal throughout, nor does it offer an explanation for the delay that is reasonable in the particular circumstances of this case. If the certification order stands, there is some prejudice to the respondents and the merits of the appeal are not strong. Overall, the justice of the case would not require that the time to appeal be extended. If the certification order fails, the appeal becomes irrelevant and the same conclusion follows.

[18] I would therefore exercise my discretion against extending the time as Quiznos asks. The motion is dismissed.

[19] The parties should provide me with their submissions concerning costs by July 10, 2009. Those submissions should not exceed three pages.

RELEASED:

JUN 26 2009

*WJG*

*WJG*