COURT FILE NO.: 06-CV-311330CP
DATE: 20070328

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SUPERIOR COURT OF JUSTICE - ONTARIO

RE: **2038724 ONTARIO LTD. and 2036250 ONTARIO INC.**, Plaintiffs

- and -

QUIZNO'S CANADA RESTAURANT CORPORATION, QUIZ-CAN LLC; THE QUIZNO'S MASTER LLC, GORDON FOOD SERVICE, INC. and GFS CANADA COMPANY INC., Defendants

BEFORE: **Justice Alexandra Hoy**

COUNSEL: **Allan D.J. Dick and David Sterns**, for the Plaintiffs

Ian N. Roher, David S. Altshuller and Heather Wood, for the Quizno's Defendants

Katherine L. Kay, for the GFS Defendants

DATE HEARD: November 27, 2006 and January 23, 2007

E N D O R S E M E N T

[1] 2038724 Ontario Ltd. ("Windsor Ltd.") and 2035250 Ontario Inc. ("Oakville Inc."), intended representative plaintiffs in a proposed class action, are Quizno's Sub franchisees operating in Ontario. Quizno's sells subway-style sandwiches.

[2] The action is against their franchisor, Quizno's Canada Restaurant Corporation ("QCRC"), its Canadian parent, Quiz-Can LLC and their U.S. affiliate and the U.S. master franchisor, The Quizno's Master LLC (the "Quizno's Defendants"), as well as against Gordon Food Service, Inc. and GFS Company Inc. (the "GFS Defendants"), from which QCRC requires Quizno's franchisees in Canada to buy supplies. The plaintiffs claim against the Quizno's Defendants for compensation and damages for breach of s. 61 of the *Competition Act*, R.S., 1985, c. C-34, breach of contract, breach of the duty of fair dealing under s. 3 of the *Arthur Wishart Act (Franchise Disclosure) 2000*, S.O. 2000, c. 3 (the "AWA"), and breach of s. 7 of the *Franchises Act*, S.O. 1995, c. F-17. The plaintiffs claim damages for civil conspiracy against the Quizno's Defendants and the GFS Defendants.

[3] The Quizno's Defendants and the GFS Defendants (collectively the "defendants") have not filed statements of defence and the certification motion has not been heard.

[4] The defendants seek to have the following motions determined prior to the certification motion:

(a) the Quizno's Defendants' motion to stay the action pursuant to s. 106 of the *Courts of Justice Act*, R.S.O. 1990, c. C.43, as amended, because a provision of the franchise agreements prohibit franchisees from bringing class actions and for the determination, pursuant to Rule 21.01(1)(a) of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, of the legal effect of such provision;

(b) the GFS Defendants' motion to strike the claim against them pursuant to Rule 21.01(1)(b) on the basis that the Amended Statement of Claim discloses no reasonable cause of action against them and, in the alternative, that the Amended Statement of Claim does not meet the legal requirements for pleading civil conspiracy;

(c) the defendants' motion for security for costs;

(d) the Quizno's Defendants' motion to strike parts of the pleadings pursuant to Rules 21.01 and 25.11; and

(e) the defendants' motion for an order striking parts of the affidavit of Douglas Johnson, filed by the plaintiffs in support of their certification motion.

All of these motions must be considered in the light of s. 12 of the *Class Proceedings Act, 1992*, S.O. 1992, c. 6 (the "CPA") which provides as follows:

> 12. The court, on the motion of a party or class member, may make any order it considers appropriate respecting the conduct of a class proceeding to ensure its fair and expeditious determination and, for the purpose, may impose such terms on the parties as it considers appropriate.

[5] The plaintiffs argue that, with one exception, all of these motions should be heard and determined at the time of the certification hearing. Plaintiffs' counsel agrees that the GFS Defendants' motion to strike the claim against them on the basis that it discloses no reasonable cause of action should be heard at this juncture because, if the GFS Defendants are successful, it will terminate the claim against them. Plaintiffs' counsel argues that the GFS Defendants motion challenging the sufficiency of the plaintiffs' pleading of civil conspiracy, should, however, be considered at the certification hearing.

1. *Motion to Stay and to determine the legal effect of the "no class action" provision.*

[6] Section 106 of the *Courts of Justice Act* provides as follows:

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> 106. A court, on its own initiative or on motion by any person, whether or not a party, may stay any proceeding in the court on such terms as are considered just.

[7] Rule 21.01(1)(a) provides as follows:

> 21.01 (1) A party may move before a judge,
>
> (a) for the determination, before trial, of a question of law raised by a pleading in an action where the determination of the question may dispose of all or part or of the action, substantially shorten the trial or result in a substantial saving of costs[.]

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Pursuant to Rule 21.01(2), no evidence is admissible on a motion pursuant to Rule 21.01(1)(a), without leave of the judge or on consent of the parties.

[8] Section 21.4 of the franchise agreements entered into between the plaintiffs and QCRC (formerly known as "QCC"), contains the following:

> 21.4 Limitation of Claims
>
> Franchisee agrees that its sole recourse for claims arising between the parties shall be against QCC or its successors and assigns. Franchisee agrees that Franchisor, the shareholders, directors, officers and employees and agents of QCC and Franchisor and their affiliates shall not be personally liable nor named as a party in any action between QCC and Franchisee…. Franchisee acknowledges and agrees, however, that Franchisor is an intended third party beneficiary of the rights accruing to QCC under this agreement, including without limitation, provisions of this agreement related to dispute resolution….QCC and Franchisees agree that any proceeding will be conducted on an individual, not a class-wide basis, and that a proceeding between QCC and Franchisees…may not be consolidated with any other proceeding between [the Franchisor] and any other person or entity.

[9] It is common ground among the parties that the reference to "Franchisor" in this provision is a reference to The Quizno's Master LLC.

[10] In their Notice of Motion, the Quizno's Defendants rely on the portion of the above excerpt pursuant to which the Franchisee agrees that any proceedings will be conducted on an individual, and not a class-wide basis. The Quizno's Defendants submit that the Franchisees are estopped from taking any position contrary to this contractual provision.

[11] The Quizno's Defendants argue that this motion should be addressed prior to the motion for certification, this Court should give effect to the provisions of the franchise

agreements, stay the action from proceeding as a class action, and require it to continue as one or more individual actions.

[12] In *Smith* v. *National Money Mart Co.*, [2005] O.J. No. 4269 (C.A.) (leave to appeal to S.C.C. dismissed) [2005] S.C.C.A. No. 528, the Court of Appeal upheld the decision of E. Macdonald J. in *Smith* v. *National Money Mart Company* (2005) 8 B.L.R. (4th) 159 (S.C.J.) that whether or not to grant a stay of proceeding because the applicable agreement required disputes to be arbitrated should be determined at the certification hearing. In her decision, Justice Macdonald wrote, at paragraph 24, "…whether or not there is an enforceable arbitration clause is a matter that is not relevant to the *Arbitration Act, 1991*, but is relevant to the preferable procedure determination that will be eventually made in this action under s. 5 of the *Class Proceedings Act, 1992*." Section 7 of the *Arbitration Act, 1991*, S.O. 1991 c. 17 requires the court in which a proceeding is commenced in respect of a matter to be submitted to arbitration under an agreement to stay the proceeding, except in certain stipulated cases.

[13] The Quizno's Defendants argue that this case is distinguishable from *Smith* v. *National Money Mart Co.* for three reasons:

(a) in this case, there are no competing statutes or legislative intentions which the Court must reconcile;

(b) the clause in the franchise agreements does not purport to oust the jurisdiction of the Superior Court in favour of an arbitrator; rather, it merely requires that the actions continue as individual actions; and

(c) unlike *Smith* v. *National Money Mart Co.*, where the plaintiffs alleged that payday lending agreements are invalid because they result in the receipt of interest at a criminal rate, the plaintiffs in this action do not allege in their Amended Statement of Claim that the franchise agreements or their terms are illegal.

[14] In my view, the fact that there is in this case no competing statute requiring this Court to stay the action is a factor that favours the plaintiffs, rather than the defendants. My discretion to refuse to grant the stay at this juncture, or a subsequent juncture, is not limited by legislation. The Quizno's Defendants advocate the "sequential approach" that was dismissed by the Court of Appeal in *Smith* v. *National Money Mart Co.* The Quizno's Defendants would have me first determine whether the "no class action" provision in issue is valid, having regard to the various arguments as to its invalidity marshalled by the plaintiffs, and, only if found invalid, proceed with the certification hearing and consider whether a class action is the preferable procedure.

[15] Justice Macdonald's comments in *Smith* v. *National Money Mart*, *supra*, regarding the jurisdiction of the Superior Court over class proceedings should be viewed in light of her conclusion that whether the arbitration clause at issue was enforceable was relevant to the preferable procedure determination, to be undertaken by a judge of the Superior Court in connection with the certification hearing.

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[16] While the plaintiffs have not pleaded that the franchise agreements or their terms are illegal, in response to this motion the plaintiffs argue that the waiver in the franchise agreements of a franchisee's ability to bring a class action breaches s. 4 of the AWA, which gives franchisees in Ontario the absolute and unrestricted right to associate with other franchisees for any purpose, and is therefore unenforceable.

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[17] I cannot accept the submissions of the defendants that the circumstances of this action are distinguishable from those that faced the Court in *Smith* v. *National Money Mart Co.*

[18] This approach – determining the legal effect of the clause at issue, if necessary to do so, as part of the preferable procedure test –will in this case hopefully minimize "litigation by installments" and therefore best ensure the fair and expeditious determination of this proposed class proceeding. This motion shall accordingly be determined at that time. The parties agree that they have fully argued the legal effect of the clause; no further submissions shall be made on this issue at the certification hearing, without leave.

2. *GFS Defendants' Motion Pursuant to Rule 21.01(1)(b)*

Motion to Strike

[19] Pursuant to Rule 21.01(1)(b), a party may move to have a pleading struck out on the ground that it discloses no reasonable cause of action.

[20] The principles applicable on a motion to strike are not in dispute:

(a) the defendant, in order to succeed, must show that it is plain and obvious that the plaintiffs could not succeed;

(b) all allegations of fact, unless patently ridiculous or incapable of proof, must be accepted as proved;

(c) the novelty of the cause of action will not militate against the plaintiffs; and

(d) the statement of claim must be read as generously as possible, with a view to accommodating any inadequacies in the form of the allegations due to drafting deficiencies.

(See *Abdool* v. *Anaheim Management Ltd.* (1995), 21 O.R. (3d) 453 (Div. Ct.) at 469.)

[21] The plaintiffs purport to assert a civil conspiracy claim against the GFS Defendants under the second branch of the tort of civil conspiracy, known as the "unlawful means" branch, established by *Canada Cement LaFarge Ltd.* v. *British Columbia Lightweight Aggregate Ltd.*, [1983] 1 S.C.R. 452, (1983) 145 D.L.R. (3d) 385 (S.C.C.) at pp. 471-2:

> Although the law concerning the scope of the tort of conspiracy is far from clear, I am of the opinion that whereas the law of tort does not permit an action against an individual defendant who has caused injury

> to the plaintiff, the law of torts does recognize a claim against them in combination as the tort of conspiracy if:
>
> (1) whether the means used by the defendants are lawful or unlawful, the predominant purpose of the defendants' conduct is to cause injury to the plaintiff; or,
>
> (2) where the conduct of the defendants is unlawful, the conduct is directed towards the plaintiff (alone or together with others), and the defendants should know in the circumstances that injury to the plaintiff is likely to and does result.

The plaintiffs allege that the Quizno's Defendants violated s. 61(1) of the *Competition Act*. That section provides as follows:

> 61. (1) No person who is engaged in the business of producing or supplying a product, who extends credit by way of credit cards or is otherwise engaged in a business that relates to credit cards, or who has the exclusive rights and privileges conferred by a patent, trade-mark, copyright, registered industrial design or registered integrated circuit topography, shall, directly or indirectly,
>
> (a) by agreement, threat, promise or any like means, attempt to influence upward, or to discourage the reduction of, the price at which any other person engaged in business in Canada supplies or offers to supply or advertises a product within Canada; or
>
> (b) refuse to supply a product to or otherwise discriminate against any other person engaged in business in Canada because of the low pricing policy of that other person.

[22] Pursuant to s. 61(9) of the *Competition Act*, every person who contravenes ss. 61(1) is guilty of an indictable offence and liable on conviction to a fine at the discretion of the Court, or to imprisonment for a term not exceeding five years or to both.

[23] The plaintiffs do <u>not</u> allege that the GFS Defendants breached s. 61(1) of the *Competition Act*. Rather, the plaintiffs specifically plead in paragraph 64 of the Amended Statement of Claim that the GFS Defendants have, contrary to ss. 21 and 22 of the *Criminal Code*, aided, abetted and counselled the Quizno's Defendants in maintaining the prices at which the GFS Defendants have supplied or offered to supply products and supplies to the Class Members, contrary to s. 61(1) of the *Competition Act*.

[24] Pursuant to s. 21(1) of the *Criminal Code*, everyone is a party to an offence who does or omits to do anything for the purpose of aiding any person to commit it or abets any person in committing it. Pursuant to s. 22 of the *Criminal Code*, where a person counsels another

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person to be a party to an offence and that other person is afterwards a party to that offence, the person who counselled is a party to that offence.

[25] At paragraph 33 of the Amended Statement of Claim, the plaintiffs plead the Quizno's Defendants entered into agreements with each of the GFS Defendants to enhance, fix and maintain the prices at which the GFS Defendants sell supplies to Class Members. At paragraph 38 of the Amended Statement of Claim, the plaintiffs plead that in exchange for the GFS Defendants agreeing to participate in the price maintenance scheme, the Quizno's Defendants promised to designate the GFS Defendants as the sole designated supplier to Class Members, and promised to use their contractual powers under the franchise agreements to prevent Class Members from purchasing from alternative, lower price suppliers, or from demanding price reductions from the GFS Defendants. At paragraph 70, the plaintiffs plead that all of the defendants (Quizno's and GFS) used the agreements and schemes to inflict harm on the Class Members for their own financial benefit. At paragraph 71, the plaintiffs allege that the Quizno's and GFS Defendants were aware that the Class Members were a captive market for the purchase of supplies and knew that their actions would cause financial hardship to all Class Members. The plaintiffs allege, in paragraph 63 of the Amended Statement of Claim, that by entering into the alleged price maintenance agreements and acting in furtherance thereof, the GFS Defendants and Quizno's Defendants entered into unlawful and tortious conspiracies to use unlawful means directed at the Class Members. Counsel advise that there is no decided case that considers this issue.

[26] The GFS Defendants say that it is plain and obvious that the plaintiffs cannot succeed on their claim against them for civil conspiracy because the alleged aiding, abetting and counseling does not amount to unlawful conduct by the GFS Defendants, as required by the second branch of the *Canada Cement Lafarge* test. Counsel for the GFS Defendants submits that the plaintiffs' argument is circular: the second branch of the test in *Canada Cement Lafarge* permits a civil action in conspiracy against defendants who in combination have caused injury to a plaintiff where the law of tort would not permit an action against an individual defendant. Counsel for the GFS Defendants says that adding, abetting and counseling are the same as acting in combination and therefore cannot in themselves satisfy the requirement for unlawful conduct, which is a precondition to maintaining an action against defendants as a result of acting in combination under the second branch of the *Canada Cement Lafarge* test.

[27] Counsel indicate that there is no decided case that considers this issue.

[28] As required to do, I have read the Amended Statement of Claim generously.

[29] I am not satisfied that it is plain and obvious that the plaintiffs have no cause of action against the GFS Defendants in civil conspiracy because their claim cannot satisfy the requirement of the second branch of the *Canada Cement Lafarge* test that the conduct of the defendants is unlawful. Accordingly, the GFS Defendants' motion to strike the plaintiffs' claim against them is dismissed.

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Sufficiency of Pleading of Civil Conspiracy

[30] In the alternative, the GFS Defendants argue that the Amended Statement of Claim does not meet the legal requirements for pleading civil conspiracy because the plaintiffs: (1) allege a conspiracy involving the Quizno's Defendnats, the GFS Defendants and "other manufacturers and suppliers" and fail to state who the " other manufacturers and suppliers" are; (2) do not provide particulars of the agreement to conspire; (3) do not describe the acts of the "other manufacturers and suppliers" or the acts of "aiding, abetting and counselling" of the GFS Defendants with sufficient clarity and precision; and (4) fail to plead special damages, which they argue is required.

[31] The Quizno's Defendants also argue that the acts of the alleged conspirators in furtherance of the conspiracy are not set out with sufficient clarity and precision; they do not allege the other deficiencies argued by the GFS Defendants.

[32] While arguing that this motion should also be determined in advance of the certification motion, the defendants acknowledge that the character, and I also believe the effect if successful, of this motion attacking the sufficiency of the plaintiffs' pleading of civil conspiracy is different than the GFS Defendants' motion asserting that the plaintiffs have no cause of action against the GFS Defendants. While not adverted to at the hearing, I note that Rule 26.02 of the *Rules of Civil Procedure* permits a party to amend its pleadings without leave before the close of pleadings, and the defendants have not yet filed statements of defence.

[33] Given the nature of the motion, the stage of the proceeding and the overlap with the Quizno's Defendants' position, I have concluded that this pleadings motion should be heard at the certification hearing.

3. *Motion for Security for Costs*

[34] Rules 56.01(1)(d) and 56.03(1) of the *Rules of Civil Procedure* provide as follows:

> 56.01 (1) The court, on motion by the defendant or respondent in a proceeding, may make such order for security for costs as is just where it appears that,
>
> . . .
>
> > (d) the plaintiff or applicant is a corporation or a nominal plaintiff or applicant, and there is good reason to believe that the plaintiff or applicant has insufficient assets in Ontario to pay the costs of the defendant or respondent[.]
>
> . . .
>
> 56.03 (1) In an action, a motion for security for costs may be made only after the defendant has delivered a defence and shall be made on

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> notice to the plaintiff and every other defendant who has delivered a defence or notice of intent to defend.

[35] The defendants submit that Rule 3.02 (1), which provides as follows, is also relevant:

> 3.02(1) Subject to subrule (3), the court may by order extend or abridge any time prescribed by these rules or an order, on such terms as are just.

Subrule (3) applies to appeals to an appellate court and is not applicable.

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[36] The defendants have not delivered statements of defence. They argue that section 12 of the CPA, referred to above, or in the alternative Rule 3.02(1), gives me the discretion to dispense with the requirement that they file a statement of defence before bringing this motion, that in the circumstances I should exercise my discretion to permit them to do so, that there is good reason to believe that the plaintiffs have insufficient assets in Ontario to pay anticipated significant costs of responding to the plaintiffs' motion for certification and I should accordingly order security for costs.

[37] The defendants refer me to *Mangan* v. *Inco Ltd.* (1996), 30 O.R. (3d) 90 (Gen. Div.). In that case, Justice Winkler held that while the CPA required the filing of a statement of defence before the certification motion, section 12 of the CPA conferred upon the court the discretion to dispense with that requirement, and that in that case, and in the preponderance of cases, a statement of defence would not be required before the hearing of the certification motion. The deadline under the *Rules of Civil Procedure* for filing a statement of defence was extended accordingly.

[38] The defendants urge me to follow a bankruptcy case, *Re Quinn* (2006), 22 C.B.R. (5th) 28 (S.C.J.), in which Morawetz J. ordered bankrupts to give security for costs for their motions for leave to sue the trustee in bankruptcy before the Trustee had filed a statement of defence. Morawetz J. noted that it was premature for the Trustee to file a statement of defence; the bankrupts did not have the right to bring the action against the Trustee without leave. The bankrupts remained bankrupt and had made no payments to the Trustee under the conditional discharge order. In considering what order was just in the circumstances, he also found that there was good reason to believe that the bankrupts' action was frivolous and vexatious. *Re Quinn* was not a putative class proceeding.

[39] In this case, the plaintiffs did not argue that a statement of defence needed to be filed in order to define the issues for the certification hearing. They did, however, put the defendants on notice that if they chose not to file statements of defence before the certification hearing, the plaintiffs would argue that the defendants were not entitled to seek security for costs before they filed statements of defence. The plaintiffs also argue that Rule 3.02 does not assist the defendants: they argue the defendants seek to eliminate a precondition to the bringing of a motion, not to abridge the time prescribed by the Rules. Moreover, they say that even if the defendants are permitted to bring their motion for costs at this time, they have failed to establish that there is good reason to believe that the plaintiffs

have insufficient assets in Ontario to pay their costs, if the plaintiffs are unsuccessful. They do not argue that they are impecunious.

[40] The only reported case of a court ordering security for costs in a Canadian class action is *Sutherland* v. *Canadian Red Cross Society* (1994), 25 C.P.C. (3d) 118 (Ont. Gen. Div.). There is no indication in *Sutherland* whether or not a statement of defence had been filed, but the case pre-dates *Mangan*.

[41] I am satisfied that s. 12 of the CPA affords the case management judge in a putative class proceeding the discretion to permit the defendants to bring a motion for security for costs before filing a statement of defence if he or she considers it appropriate to do so to ensure the fair and expeditious determination of the class proceeding. The plaintiffs have effectively conceded that the filing of a statement of defence is not required to define the issues to be considered at the hearing of the certification motion; the failure of the defendants to file a statement of defence should therefore not be an absolute bar to a motion for security for costs before the certification hearing. From a timing perspective, it is fair to consider the motion before the certification motion is heard, provided the heightened access to justice objective in class proceedings is addressed under Rule 56.01(1).

[42] In order to obtain an order for security for costs pursuant to Rule 56.01(1), the defendants must establish that there is good reason to believe that the plaintiffs have insufficient assets in Ontario to pay the costs of the defendants. If the defendants do so, the court may then make such order for security for costs as is just.

[43] The defendants estimate their costs of this litigation, on a partial indemnity scale, up to and including the motion for certification, will exceed $590,000. They argue that it is clear that the plaintiffs do not have sufficient assets in Ontario to fund a costs award against them in that magnitude.

[44] The plaintiffs acknowledge that Windsor, although still operating a franchise, is unable to satisfy any costs award.

[45] The evidence is that Oakville is able to pay salaries or management fees to its two shareholders and operates at a small profit. An unaudited balance sheet as at September 30, 2006 discloses that the book value of its assets, primarily comprised of the depreciated value of restaurant equipment and leasehold improvements, is $161,635. Its primary liabilities are secured bank debt in the amount of $141,400 and shareholder loans in the amount of $80,000. It had retained earnings of $15,953.35 as at September 30, 2006. Oakville's landlord is a Quizno's entity. The shareholders have guaranteed the bank debt. They own other Quizno's franchisees. The plaintiffs' evidence is that the cost of a new Quizno's franchised restaurant, including franchise and site selection fees paid to Quizno's, equipment purchased from a Quizno's entity and leasehold improvements, is at least $250,000, and they submit that the market value of Oakville's assets is accordingly at least that.

[46] Proposed class counsel has been retained on a contingency fee basis. Oakville concedes that it is not in a position to fund all of the disbursements. Class counsel has funded almost all of the disbursements to date. Various other franchisees- putative class members-

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have made loans to an association of Quizno's franchisees, to be used to help fund disbursements.

[47] Section 31(1) of the CPA provides that in exercising its discretion with respect to costs under subsection 131(1) of the *Courts of Justice Act*, the court may consider whether the class proceeding was a test case, raised a novel point of law or involved a matter of public interest. As Justice Winkler noted in *Garland* v. *Consumers' Gas Co*., [1995] 22 O.R. (3d) 767 (Gen. Div.), p.776, the courts have been disinclined to award costs against unsuccessful plaintiffs in a class proceeding where some or all of the criteria in s. 31(1) are present. "Public interest" has been broadly defined in this context and includes something of interest to the community at large beyond the class members. (See *Pearson* v. *Inco Ltd*., [2006] O.J. No. 991 at para.9) One collateral issue raised in this action – namely the effect of no class action clauses in franchise agreements – has not been considered before, will be of interest to the large community of franchisees in Ontario who are not class members and might be seen as a public interest question. It is clear that the "costs of the defendant" in Rule 56.01(1) refers to costs awarded by the court, and not costs incurred. Given that I am not satisfied at this juncture that it is more likely than not that a costs order against the Quizno's Defendants would follow an unsuccessful certification motion, I do not have good reason to believe that the plaintiffs have insufficient assets in Ontario to satisfy a costs award in favour of the Quizno's defendants.

[48] Section 9.01 of the sublease between Oakville and Quizno's Canada Real Estate Corporation ("QCREC") in respect of the premises occupied by Oakville provides that Oakville cannot assign the sublease without the prior written consent of QCREC, which may be unreasonably withheld or given on conditions. Quizno's, as landlord, and presumably as franchisor, has significant ability to influence the realization value of Oakville's assets. Had I concluded that a costs award in favour of Quizno's was likely if the plaintiffs were unsuccessful on the certification motion, and there was good reason to believe that, having regard to realization risks, the plaintiffs have insufficient assets in Ontario to satisfy a costs award in favour of the Quizno's Defendants, the ability of Quizno's to influence the realization value of Oakville's assets would in my view be a factor to consider in determining what award was "just" in the circumstances, and in this class action context would militate against the grant of an award of security for costs.

[49] The position of the GFS Defendants may be seen as different. While it will be an issue at the certification hearing, and therefore of interest to the GFS Defendants, the GFS Defendants are not parties to, or affiliates of parties to, the "no class action" provision. At this juncture, I think it is more likely than not that the GFS Defendants would be entitled to a costs award if the certification motion were unsuccessful. They estimate, and it is really nothing more than an estimate, that their costs, including disbursements, up to and including certification, will be $208,230.00. With the exception of the significant costs awards in 2002 against unsuccessful plaintiffs by the motions judge in *Gariepy* v. *Shell Oil Co.,* [2002] O.J. No. 3495 (S.C.J.) and *Pearson* v. *Inco Ltd.*, [2002] O.J. No. 3532 (S.C.J.), costs awarded against unsuccessful plaintiffs in certification motions have been modest. For example, in *Shaw* v. *BCE Inc.*, [2003] O.J. No. 2695 (S.C.J.), which followed the 2002 certification decisions in *Gariepy* and *Pearson*, the successful defendants sought $240,000 in costs, and

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Justice Farley awarded an aggregate of $30,000. The GFS Defendants have satisfied me that there is good reason to believe that the plaintiffs have insufficient assets in Ontario to satisfy a costs award in favour of the GFS Defendants, even of the magnitude typically ordered. As noted above, the plaintiffs do not submit that they are impecunious.

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[50] The next question is what order for security for the GFS Defendants' costs, if any, is just in the circumstances. In *Sutherland* v. *Canadian Red Cross Society*, *supra*, the defendants sought security in the amount of $155,000. The plaintiffs resided outside of Ontario. There was no evidence of impecuniosity. Montgomery J. awarded security for costs of $5,000, which was both the amount that plaintiffs' counsel had available in the their trust account and the amount Montgomery J. indicated he had awarded as costs in *Bendall* v. *McGhan Medical Corp*. (1993), 14 O.R. (3d) 734 (Gen.Div.), a breast implant case he had recently certified. While Justice Montgomery noted the plaintiffs undertaking to apply to the Class Proceedings Fund, he remarked that the certification motion might well be disposed of before the Law Society determined whether or not it would grant funding; the undertaking to apply for funding does not appear to have been determinative.

[51] The quantum of security for costs awarded in proceedings that are not class actions, or putative class actions, is in my experience typically conservative. The Court of Appeal in *Pearson v. Inco Ltd.,* [2006] O.J. No. 991 at para. 11 recently reiterated that the objective of the CPA of enhanced access to justice is a factor in fixing the costs of a certification motion. I am of the view that it is also a factor in determining what order for security for costs is just in the circumstances. Having regard to this, and the modest amount of costs an unsuccessful plaintiff in a certification motion is typically ordered to pay, the GFS Defendants are awarded $10,000 as security for costs.

[52] As noted above, the GFS Defendants are designated under the Quizno's franchise agreements as exclusive suppliers. A rupture of the supply arrangement could be fatal to the plaintiffs' operations. Between the hearing of these motions, and the release of this endorsement, the GFS Defendants advised that they were terminating supply to Windsor Ltd. and its affiliates. The plaintiffs brought a motion for an interim injunction. The matter was resolved by a consent order, made January 31, 2007, pursuant to which the GFS Defendants are to continue to make shipments to the plaintiffs in the ordinary course and on existing payment terms, and are not to terminate the distribution agreements between it and the plaintiffs without providing the plaintiffs' counsel an opportunity to apply to the court for injunctive relief. The consent order sufficiently fetters the ability of the GFS Defendants to affect the financial position of the plaintiffs that the GFS Defendants' role as exclusive suppliers does not make the award of security for costs I have provided for "unjust".

4. *Quizno's Defendants' Motion to Strike Parts of the Pleadings*

[53] The Quizno's Defendants argue that various paragraphs of the Amended Statement of Claim should be struck because they contain irrelevant, scandalous and prejudicial allegations or, in the case of the conspiracy claim, because they do not contain a clear account of each defendant's allegedly conspiratorial overt acts.

[54] If these motions were determined in favour of the Quizno's Defendants, they would not terminate the litigation against them. As noted above, the certification motion in this matter has been scheduled for April 23 through 26, 2007. The issues raised by the Quizno's Defendants can be more efficiently considered at that time. If those issues are determined at this time, there is a risk of "litigation by instalments". In my view, requiring these motions to be heard at the time of the certification motion best ensures the fair and expeditious determination of this action.

[55] As to the Quizno's Defendants' argument that it is unfair to them that the allegations they submit are scandalous and prejudicial should be permitted to remain outstanding until the certification motion is heard, this action was commenced on May 12, 2006 and the allegations have been outstanding since that time. In my view, deferring a consideration of the remaining disputed provisions until the hearing of the certification motion would not be materially prejudicial to the defendants.

[56] I note that at the time these motions were heard, the certification motion was scheduled for April 26 through 29, 2007. The scheduled delay between the hearing of these motions and the certification motion was brief. Following the attendance in relation to the plaintiffs' motion for injunctive relief, referred to above, the release of this endorsement was delayed at the parties' request while they considered if they were prepared to mediate their dispute and, if so, whether they wished this endorsement to be released. The parties advised that they were prepared to mediate their dispute, subject to conditions, and recently requested that this endorsement be released. They have not confirmed that they are vacating the April dates for the certification hearing, although I assume this to be the case. While, if the mediation is unsuccessful, the delay between the time these motions were heard and the hearing of the certification motion will be greater than initially envisaged, a certification hearing, if ultimately required, can be promptly re-scheduled, and I remain of the view that deferring consideration of the disputed provisions until the certification motion is heard would not be materially prejudicial to the Quizno's Defendants.

5. *Motion to Strike Portions of the Affidavit of Douglas Johnson, sworn July 27, 2006*

[57] The Quizno's Defendants argue that I should at this time consider their motion to strike various paragraphs of the Johnson affidavit because it contains secondary hearsay evidence, opinion evidence, fails to state the source of Mr. Johnson's information and belief, contains legal argument, contains irrelevant information, contains statements that are offensive, scandalous, frivolous and vexatious and refers to reasons for judgment in findings in other legal proceedings.

[58] I have concluded that it is better to consider this motion at the same time that I hear the certification motion. At that time I can better determine what is relevant and can simply give no weight to any information improperly included in the affidavit. It is more efficient for that analysis to be done at the time that I am reviewing the complete certification record and can view all the materials in context. I expressed this view to the defendants at the case conference held before the defendants elected to, nonetheless, proceed with this motion. As I note above in relation to the defendants' submission that portions of the pleadings are

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prejudicial and scandalous, proceeding promptly to the certification hearing will minimize any prejudice arising from having these allegations remain in the public record.

Summary of Conclusions

[59] The Quizno's Defendants' motion for a stay and the determination off the legal effect of the " no class action clause" shall, if necessary, be considered at the certification hearing. The GFS Defendants' motion to strike the plaintiffs' claim against them is dismissed. The Quizno's Defendants' motion for security for costs is dismissed. The GFS Defendants shall be entitled to security for costs in the amount of $10,000. The defendants' pleadings motions and motions to strike portions of Mr. Johnson's affidavit shall be heard at the time the certification motion is heard.

Costs

[60] My preliminary view as to costs, without the benefit of submissions from the parties, is the following. The plaintiffs shall be entitled to costs in relation to the Quizno's Defendants' unsuccessful motions for security for costs. Having regard to their limited success on the their motion for security for costs, the GFS Defendants shall be entitled to costs of $1500 on that motion. Except as noted below, the plaintiffs shall be entitled to costs in relation to preparation for the balance of the motions, to the extent surplus to the work that would be, or would have been, required to respond to the motions at the time of the certification hearing. Entitlement to costs in relation to the GFS Defendants' motion to strike should be determined following the outcome of the certification motion; it addressed an issue that would otherwise have been as issue on the certification motion and therefore my preliminary view is that costs in relation to that issue should follow on the outcome of the certification motion.

[61] If the parties wish to make submissions on entitlement to costs, or how costs are to be dealt with, or cannot agree on quantum, I suggest the plaintiffs provide brief written cost submissions within fourteen days of the release of the completion of the mediation, and the defendants provide responding submissions within fourteen days after the plaintiffs' submissions.

[62] If counsel is of the view that another timetable is more appropriate, or that a case conference is necessary to discuss the cost process, I may be spoken to.

Hoy J.

DATE: March 28, 2007

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