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ONTARIO

SUPERIOR COURT OF JUSTICE

B E T W E E N:	)	
	)	
LANDSBRIDGE AUTO CORP. AND 405341 ONTARIO LIMITED	)	***Allan D.J. Dick*** and ***David Sterns*** - - for the plaintiffs/moving parties
	)	
Plaintiffs	)	
	)	
- and -	)	
	)	
	)	
MIDAS CANADA INC. AND MIDAS INTERNATIONAL CORPORATION	)	***Malcolm Ruby, Jeffrey P. Hoffman*** and ***Scott Kugler*** - - for the defendants/respondents
	)	
Defendants	)	
	)	
	)	
	)	
	)	**HEARD:** January 20 and 21, 2009

Proceeding Under the *Class Proceedings Act, 1992*

REASONS FOR DECISION

CULLITY J.:

[1] The plaintiffs operate automotive specialty shops in Canada pursuant to a standard form of Midas Franchise and Trade Mark Agreement (the "Franchise Agreement" or the “Agreement”) with the defendant, Midas Canada Inc. ("Midas"). They claim damages from Midas for alleged breaches of the Franchise Agreement, derogation from grant and breaches of the duty of fair dealing in section 3 of the *Arthur Wishart Act (Franchise Disclosure), 2000*, S.O. 2000, c. 3 and similar legislation in force in Alberta and Prince Edward Island. In addition, restitutionary relief is claimed against Midas and Midas International Corporation ("Midas International"), as well as an abatement of royalties payable to Midas pursuant to the Franchise

Agreement, and various consequential or ancillary declarations and mandatory orders. The defendants have delivered a statement of defence to which the plaintiffs have replied. Deponents on each side have been cross-examined.

[2] The plaintiffs (respectively, “Landsbridge” and “405”) and Midas are incorporated in Ontario. Midas International is a Delaware corporation of which Midas is alleged be - directly or indirectly - a wholly-owned subsidiary. Midas International is said to be one of the largest providers of automotive service in the world with approximately 2600 franchised, licensed and company-owned Midas shops in 19 countries, including approximately 1571 in the United States and 180 in Canada.

[3] The action was commenced under the *Class Proceedings Act, 1992*, S.O. 1992, c. 6 and the plaintiffs have now moved for certification on behalf of a class consisting of corporations, partnerships and individuals carrying on business in Canada on or after May 31, 2007 pursuant to Midas Franchise Agreements.

[4] The claims arise out of certain unilateral and fundamental changes that were allegedly made by the defendants to the Midas Franchise System (the "Midas System") in 2003. It is pleaded that these changes were made in breach of the defendants' contractual, statutory and other obligations owed to the class members, and caused serious and continuing losses to them, while improperly benefiting the defendants.

THE FACTS

[5] Although for the main part based on the plaintiff's pleading, the following facts were, unless otherwise mentioned, not contradicted for the purpose of the motion:

- Landsbridge executed a Franchise Agreement dated August 1, 2004;

- 405 first executed a Franchise Agreement dated October 6, 1981. After it had moved its business to a different location, it executed another such Agreement dated August 1, 1989. (The dates of the plaintiffs’ Agreements are not referred to in the statement of claim but are admitted in the plaintiffs’ reply to the statement of defence);

- For most of its long history, Midas, its predecessors and affiliates operated a Franchise System under which licences were granted to the Franchisees to use Midas' proprietary trade marks and indicia in operating businesses for the provision of specified automotive services and the purchase from Midas, installation and sale, of specified automotive products;

- Before 1981, the Franchise Agreement provided for each Franchisee to pay a royalty of 5 per cent on its retail sales of products and services;

- After negotiations between Midas and the Canadian Midas Dealers Association, a new Franchise Agreement was offered to the Canadian Franchisees in 1981. This provided for an increase in the royalty payments to 10 per cent;

- In a written communication of November 26, 1980 to the Canadian Franchisees, officials of Midas forwarded a draft of the new Franchise Agreement together with a memorandum summarising the changes it contained. The agreement for the additional royalty of 5 per cent was described as the main change, but it was stated that this would be more than offset by "a generous 14.5 per cent discount from the prices paid by dealers under the existing Agreement" on products purchased from Midas. The memorandum stated that entitlement to the 14.5 per cent discount would be provided "under the terms of the new Agreement" and was intended to compensate Midas dealers for the additional 5 per cent royalty that was to enable it to develop new products and services. The plaintiffs allege, but Midas has denied, that the 14.5 per cent discount was to be applied to the prices Midas offered to its most preferred wholesale purchasers who were not Midas Franchisees;

- In a subsequent memorandum of January 28, 1981 the advantages of the 14.5 per cent discount and their offsetting effect on the additional 5 per cent royalty were again emphasised although, in this memorandum, the discount was not stated to be provided under the terms of the new Franchise Agreement but, rather, it was indicated that it would be implemented by changes to the "product sales policies" of Midas. This memorandum is not referred to in the statement of claim;

- The offsetting effect of the 14.5 per cent discount conferred substantial competitive advantages on the Midas Franchisees;

- For 20 years, the calculation of the discount was included on the price lists and invoices provided by Midas to the Franchisees. This practice ceased in 2001 after the Franchisees were informed that, in the future, the discount would simply be deducted in determining the prices to be paid by them without being separately disclosed. In consequence, the Franchisees lost the ability to verify that the discount had been applied, or properly calculated;

- It is alleged in the statement of claim that at some time between June 1, 2001 and December 2003 - and without the knowledge of the Franchisees - Midas began to eliminate the 14.5 per cent discount so that the Franchisees lost their competitive advantage over other purchasers of the Midas products. In their reply to the statement of defence the plaintiffs state that they have no knowledge of whether – as pleaded by the defendants - the discount was preserved until Midas ceased to supply its products to the Franchisees;

- In or around July 2003, Midas commenced to withdraw from the sale and distribution of its products to the Franchisees. It ceased to manufacture them and, in March 2006, it closed its last distribution centre for the exhaust system parts on which – in the November 1980 communication - its profits had been said to depend;

- In July, 2003, Midas entered into an agreement with Uni-Select Inc ("Uni-Select") - a wholesale distributor of automotive parts in Canada - under which Uni-Select became the exclusive supplier of Midas-branded products;

- The plaintiffs allege that the Uni-Select agreement is a wholly inadequate substitute for the former Midas distribution system and that - in addition to its failure to provide for a continuation of the 14.5 per cent discount - it places them at a significant competitive disadvantage for a number of other reasons;

- The defendants have filed an affidavit of Mr William M. Guzik, the chief financial officer of Midas and Midas International, in which he deposes to the existence of sound business and financial reasons for the decision to abandon the manufacture and distribution of automotive parts. In cross-examination, Mr Guzik indicated that, even before 2001, Midas would artificially inflate - gross up - the prices shown on its invoices in order to give the appearance of a 14.5 per cent discount. He stated that, while initially there was a true 14.5 per cent discount, it had no enduring relevance or importance as "we were controlling what it was a discount off of ...", and because Midas had the ability to discontinue the sale of products at any time it became undesirable.

- Mr Guzik also addressed and attempted to answer a number of the plaintiffs' allegations relating to the detrimental effect of the Uni-Select agreement, and to benefits that allegedly have been improperly received by Midas. He refers also to extensive consultations with representatives of the Canadian Franchisees that occurred before the execution of the agreement with Uni-Select and to disclosure statements that have been provided since 2003 to prospective Franchisees (including Landsbridge), and to those that were renewing their franchises. The plaintiffs have delivered an affidavit of a Franchisee participant in the alleged consultations who denies that they were either extensive or meaningful;

- On or about October 11, 2004, Midas International and a representative of the International Midas Dealers Association executed an agreement entitled the "North American Supply Chain Council Charter" (the "Charter"), which was intended to utilize the combined purchasing power of Midas International and the Franchisees in order to procure mutually advantageous supply agreements with

vendors of automotive products. The plaintiffs claim, and the defendants deny, that Midas International has breached its obligations under the Charter;

- On November 30, 2007, the president of Midas International announced changes to the Midas supply chain and warranty program that were said to be beneficial to the North American Franchisees. It was indicated, however, that, in view of this litigation and the magnitude of the damages claimed on behalf of the class, implementation of the changes in Canada would be deferred; and

- Since this proceeding commenced, Midas has applied to petition Landsbridge into bankruptcy.

THE FRANCHISE AGREEMENT

[6] The issues in the proceeding appear to depend almost entirely on the correct interpretation and effect of the Franchise Agreement, and whether the alleged facts constitute bad faith and unfair dealing on the part of the defendants. It was not disputed that the Franchise Agreement is in standard form and was executed by, or on behalf of, each of the Franchisees and Midas. The Agreement executed by Landsbridge in 2004 is in all material respects identical to that provided by Midas in 1981. Relevant provisions of the Agreement are as follows:

- ***[First recital]*** Midas and Midas International Corporation are engaged in the business of operating, and of licensing the operation by others, of automotive specialty shops known as a "Midas Muffler Shops", which engage in the sale and installation of those products listed in Schedule A attached hereto, and in the performance of those services listed in said Schedule A. Midas and Midas International Corporation make available and furnish to their franchisees genuine Midas products which are offered, sold, and installed by said shops, certain of which products carry a unique and valuable guarantee to the consumer public.

- ***[Third recital]*** Midas and Midas International Corporation have also developed a unique and successful system for the establishment and operation of said shops, (hereinafter referred to as the "Midas System"), which includes site selection, shop construction and layout, equipment selection and installation, purchasing and inventory control methods, accounting methods, and merchandising, advertising, sales, and promotional techniques, installation techniques, personnel training and other matters relating to the efficient and successful operation of said shops and the maintenance of high standards of quality.

- ***[Sixth recital]*** Franchisee desires to establish and operate a Midas Muffler Shop at the location hereafter designated, to use in connection therewith the Midas proprietary marks and indicia and the Midas System, to have the right to sell and

install therein genuine Midas products and to issue and honor the Midas guarantees in connection therewith, and to derive the benefits of Midas' information, experience, advice, guidance, know-how, and customer goodwill.

•***[Seventh recital]*** Franchisee acknowledges that it is essential to the maintenance of the high standards which the public has come to expect of authorized Midas Muffler Shops, to the preservation of the integrity of the Midas Proprietary Marks, indicia, and goodwill, and to the value of the Midas guarantees, that each franchisee adhere to certain uniform standards, procedures and policies hereafter described.

• Section 1.1. **Grant of Licence**: Midas hereby grants to Franchisee, and Franchisee hereby accepts from Midas, the right, franchise and licence, for the term and upon the terms and conditions hereafter set forth:

> to establish and operate a Midas Muffler Shop at the following location only ...
>
> to use, in connection with the operation of the Shop, the Midas System;
>
> to purchase from Midas and to resell from the Shop those genuine Midas products listed in Schedule A attached hereto, and to sell and install said genuine Midas products in or from the Shop; ...

• Section 3.1 (b). Midas agrees to make available to Franchisee from time to time all improvements and additions to the Midas System, to the same extent and in the same manner as they are made available to Midas Franchisees generally.

• Section 3.2 (a). Midas agrees to sell to Franchisee, during the term of this Agreement and subject to the terms hereafter set forth, such quantities of those genuine Midas products referred to in Schedule A attached hereto as Franchisee may order from time to time, provided however, that Midas may at any time and from time to time, in its sole discretion discontinue the sale to all its Franchisees of any product or products, if, in the opinion of Midas, the continued sale of such products becomes unfeasible, unprofitable, or otherwise undesirable, and upon such discontinuation the license herein granted with respect to such product or products shall terminate unless Midas has provided for alternative sources of supply meeting its standards and specifications and expressly elects to continue such license subject to such standards and specifications.

• Section 3.2 (b). The prices, delivery terms, terms of payment, and other terms relating to the sale of such products by Midas shall be as prescribed by Midas

from time to time, and shall be subject to change by Midas without prior notice at any time.

• Section 4.1. Franchisee agrees to pay to Midas, within 10 days after the close of each calendar month during the term of Agreement, a royalty in an amount equal to 10 per cent (10 %) of Franchisee's Net Revenue for said preceding month. ...

• Section 6.15. Franchisee shall at all times comply with all lawful and reasonable policies, regulations, and procedures promulgated or prescribed from time to time by Midas in connection with the Shop or Franchisee's business, ...

• Section 10.9. **Entire Agreement**: This Agreement together with any written lease or sublease of the Shop premises entered into between Franchisee and Midas or any of its subsidiaries or affiliated corporations constitutes and contains the entire agreement and understanding of the parties with respect to the subject matter hereof and thereof. There are no representations, undertakings, agreements, terms or conditions not contained or referred to herein or in any such lease or sublease. This Agreement supersedes and extinguishes any prior written agreement between the parties or any of them relating to the operation of the Shop at the premises described in Section 1.1 (a) hereof, ...

• Section 10.11. **Controlling Law:** This Agreement, including all matters relating to the validity, construction, performance, and enforcement thereof, shall be governed by the laws of the Province of Ontario.

CERTIFICATION

[7] For the purposes of certification, each of the requirements in section 5 (1) (a) must be satisfied.

1. Section 5 (1) (a): Disclosure of a cause of action

[8] In *Cloud v. Canada (Attorney General)* (2004), 73 O.R. (3d) 401 (C.A.), at para 41, Goudge J.A. described the test to be applied under section 5 (1) (a) as follows:

> It is now well established that this requirement will prevent certification only where it is "plain and obvious" that the pleadings disclose no cause of action, as that test was developed in *Hunt v. Carey Canada Inc.* ...

[9] As the question is to be decided on the basis of the pleadings, evidence to support, or refute, the existence of a cause of action is not admissible and the pleading is to be read as generously as possible with a view to accommodating any inadequacies in the form of the

allegations due to drafting deficiencies: *Abdool v. Anaheim Management Ltd.* (1995), 21 O.R. (3d) 453 (Div.Ct.), at page 469. Neither novelty of the action, the complexity of the issues nor the potential for a defendant to present a strong defence will prevent the requirement from being satisfied. This will occur only if the action, as pleaded - and assuming that the facts set out in the statement of claim are proven - is certain to fail: *Hunt v. Carey Canada Inc.* (1990), 74 D.L.R. (4th) 321, at page 336; and *Abdool*, at page 469.

[10] The causes of action on which the plaintiffs rely for their claim for damages include breaches of the Franchise Agreement and of the duty of fair dealing in section 3 of the *Arthur Wishart Act*. In addition to these causes of action, they plead the rule against derogation of grant as a separate cause of action entitling them to damages.

(a) Breach of contract – the Franchise Agreement

(i) Principles of interpretation

[11] The plaintiffs' claim for damages for breach of contract depends, in the first place, on the correct interpretation of the Franchise Agreement. The general principles of interpretation that are applied to commercial agreements are therefore relevant. These have recently received the attention of appellate courts in a number of cases including *Eli Lilly & Co v. Novopharm Ltd*., [1998] 2 S.C.R. 129, *Ventas, Inc. v. Sunrise Senior Living Real Estate Investment Trust* (2007), 85 O.R. (3d) 254 (C.A.), *Dumbrell v. The Regional Group Of Companies Inc.* (2007), 85 O.R. (3d) 616 (C.A.) and *3869130 Canada Inc v. I.C.B. Distribution Inc*, [2008] O.J. No. 1947 (C.A.).

[12] As well as emphasising that particular provisions in such contracts must be construed in the light of the contract as a whole and "in a fashion that accords with sound commercial principles and good business sense, and that avoids a commercial absurdity" (*Ventas*, at para 24), these authorities affirm that, even in the absence of any ambiguity "courts may always have regard to the context and to the objective evidence of the surrounding circumstances underlying the negotiations": *I.C.B. Distribution Inc.*, at para 32. As Doherty J.A. stated in *Dumbrell* (at para 52):

> The meaning of a document is derived not just from the words used, but from the context or the circumstances in which the words were used.

[13] Although evidence is not admissible for the purpose of determining whether a pleading discloses a cause of action, this does not, in my opinion, mean that context is to be ignored when a question of interpretation arises under section 5 (1) (a) of the CPA. Rather, the plain and obvious test must be applied to the words of the contract read in the light of the contextual circumstances pleaded.

[14] Aspects of the context that have special relevance to the issues of contractual interpretation, and that arise in this case, are that the Franchise Agreements are contracts of adhesion in a standard form and, as such, they are to be construed *contra proferentem*. Another matter of some relevance is that in Franchise arrangements there is ordinarily a marked inequality of bargaining power between the parties: *Shelanu v. Print Three Franchising Corp.* (2003), 64 O.R. (3d) 533 (C.A.),, at para 58. This can be particularly important when reliance is placed by a franchisor on an "entire agreement" clause such as that in section 10.9 of the Franchise Agreement. Such clauses are to be construed strictly and even where they would, as a matter of construction, apply, their enforcement will be subject to the principles relating to unconscionable bargains that are applied to "exclusion clauses" purporting to limit liability for damages: *Shelanu*, at paras 31-36. Entire agreement clauses are not, in my opinion, to be considered as licences to make – and subsequently resile from – pre-contractual representations and undertakings with complete impunity.

(ii) The requirement of good faith

[15] In addition, and independently of the provisions of the *Arthur Wishart Act* to which I will refer, franchisors are under a contractual obligation to exercise their powers under franchise agreements in good faith and with due regard to the interests of the franchisees: *Shelanu*, at paras 66 and 69. While requiring a franchisor to observe standards of honesty, fairness and reasonableness, and to give consideration to the interests of the franchisees, this duty does not involve an obligation to prefer the interests of the latter, and is not a fiduciary duty in that sense: *Shelanu*, at paras 5, 68-71.

[16] In *Transamerica Life Inc. v. ING Canada Inc*. (2003), 68 O.R. (3d) 457 (C.A.) - a case that did not involve a franchise agreement - O'Connor A.C.J.O. described the duty of good faith applicable to contracting parties as follows (at para 53):

> I agree ... that Canadian courts have not recognized a stand-alone duty of good faith that is independent from the terms expressed in a contract or from the objectives that emerge from those provisions. The implication of a duty of good faith has not gone so far as to create new, unbargained-for rights and obligations. Nor has it been used to alter the express terms of the contract reached by the parties. Rather, courts have implied a duty of good faith with a view to securing the performance and enforcement of the contract made by the parties, or as it is sometimes put, to ensure that parties do not act in a way that eviscerates or defeats the objectives of the agreement that they have entered into: ...

[17] In *Carvel Corporation v. Baker*, 79 F. Supp. 2d 53 (D.Conn. 1997), at para 69, a franchisor's obligation to act in good faith was described as an implied covenant that operates in the following manner:

> [The] doctrine of good faith performance imposes a limitation on the exercise of discretion vested in one of the parties to a contract... In describing the nature of that limitation the courts of this State have held that a party vested with contractual discretion must exercise that discretion reasonably and with proper motive, and may not do so arbitrarily, capriciously, or in a manner inconsistent with the reasonable expectations of the parties.

[18] In denying summary judgment to a franchisor on the ground that it had not been demonstrated that a change in a distribution system had been made in good faith, the court in *Carvel* commented that the franchisees were entitled to expect that the franchisor would not act to destroy the rights of the franchisees to enjoy the fruits of the contract. This comment encapsulates the allegations of bad faith and unfair dealing made in the plaintiffs' pleading in this case.

[19] Again, in *Restaurants Mikes inc. v. 147564 Canada inc*, [2005] Q.J. No. 6840 (Q.C.A.), where the broad language of a clause permitting a franchisor to make changes to the franchise system was under consideration, Pelletier J.A. stated, at para 32:

> The drafting of Section XXI makes it clear that it allows the franchiser to make changes to the way that the franchise is operated, which the respondent admits. However, it does not authorize the franchiser to make changes that will result in a different contract, nor does it entitle the franchiser to increase unilaterally the level of royalties to be paid on sales or to remove the benefit of a clause providing for no payment until certain sale figures are reached. In my view, such fundamental changes to the business relationship go beyond the intent of the parties and require the specific consent of the franchisee.

[20] It is in this context that I believe the doctrine of derogation from grant is most relevant. As applied to a franchise relationship in an English case that was cited by plaintiffs' counsel, *Fleet Mobile Tyres Ltd v. Stone*, [2006] EWCA Civ 1209 (C.A.), it was described (at para 54) as "a broad principle of fair dealing" to be applied in the construction of the agreement. It was said to be a rule of common honesty and

> ... a useful reminder that in the absence of clear words, parties to a contract are unlikely to have intended to make significant derogations through the operation of a subsidiary clause from the primary benefits intended to be conferred under [the contract]" (para 55).

[21] On the facts of the case the court held that the principle required that powers given to the franchisor in the franchise agreement would not be exercised so as to impede substantially the exercise of rights given to the franchisees.

[22] In my opinion, the requirement of non-derogation is a principle of construction that is subsumed under, and adds nothing significant to, the requirement of fair dealing. I do not accept that a breach of the requirement is properly pleaded as a separate cause of action.

[23] In connection with the obligation to act in good faith, the plaintiffs have pleaded and rely on section 3 of the *Arthur Wishart Act* which reads as follows:

> 3. (1) Every franchise agreement imposes on each party a duty of fair dealing in its performance and enforcement.
>
> (2) A party to a franchise agreement has a right of action for damages against another party to the franchise agreement who breaches the duty of fair dealing in the performance or enforcement of the franchise agreement.
>
> (3) For the purpose of this section, the duty of fair dealing includes the duty to act in good faith and in accordance with reasonable commercial standards.

[24] I do not understand the statute to impose a standard that differs materially from that applicable to franchise agreements at common law. In *Machias v. Mr. Submarine Ltd.* (2002), 24 B.L.R. (3d) 228 (Ont. S.C.J.), at para 114, Wilson J. accepted that, from a practical standpoint, section 3 "simply codifies the common law". This was also the view of Kershman J. in *1117304 Ontario Inc. v. Cara Operations Ltd.*, [2008] O.J. No. 4370 (S.C.J.), at para 66. In *Shelanu* - where there was a question whether the legislation was in force at the relevant times and where a breach of the common law obligation of good faith had been found - the Court of Appeal (at para 63) did not find it necessary to consider whether there had been a breach of the statutory duty.

[25] As the requirement of fair dealing applies to every franchise agreement, it appears that it cannot be excluded by, for example, the terms of an entire agreement clause, and will override them to the extent of any inconsistency in their application.

[26] Although the plaintiffs' reliance on the provisions of the *Arthur Wishart Act* is pleaded as a separate cause of action, it is accepted that, for the purpose of section 5 (1) (a), the pleading must be read generously. In my opinion, the plaintiffs' allegations of breach of contract can quite properly be read in the light of - and as complemented by - claims that the defendants' conduct that constituted the breaches violated the duty to act in good faith and in accordance with reasonable commercial standards within the meaning of section 3 (3) of the *Arthur Wishart Act.* In view of those allegations, the grounds on which punitive damages are claimed, and a consideration of the pleading as a whole, it is, I believe, reasonable to treat the plaintiffs' claims of breaches of contract as raising issues relating to the implied duty of good faith as well as – and independently of - an application of normal rules of construction to the terms of the Franchise Agreement. As I will indicate, the causes of action for breach of contract that I consider to have been adequately disclosed in the statement of claim depend entirely on the requirement of good faith performance, and not on the express terms of the Agreement. I will consider, first, the

claims that I understand to be based on the terms of the Franchise Agreement independently of the duty to act in good faith.

(iii) Breaches of express terms of the Franchise Agreement

[27] The following breaches of the express terms of the Franchise Agreement are pleaded:

> (i) breach of a duty to sell to the Franchisees such Midas products as they may order from time to time;
>
> (ii) breach of a contractual term to effect such sales at prices reflecting a 14.5 per cent discount from the wholesale prices at which Midas sold to other preferred customers;
>
> (iii) breach of an obligation to provide a warranty and guarantee on all products purchased from Midas; and
>
> (iv) in the alternative, in the event that Midas was permitted to discontinue all sales of products to the Franchisees, breach of an obligation to provide a substitute distribution system offering equivalent advantages to the Midas System in terms of the availability of products, competitive pricing that would reflect the 14.5 per cent discount, and all other terms and conditions of sale.

[28] By way of defence to the plaintiffs' contractual claims, the defendants have pleaded that:

> (i) sections 3.2 (a) and 3.2 (b) of the Franchise Agreement between Midas, the plaintiffs and the putative class members provides that Midas can set the prices at which it sells products to Franchisees, change product prices at any time without notice, and cease to sell products if it believes that sales are unprofitable or undesirable; and
>
> (ii) in addition, as the 14.5 per cent discount was not included in the terms of the Franchise Agreement, it was not a contractual obligation of Midas. In this connection, and generally, they plead and rely on the entire Agreement clause in section 10.9 of the Franchise Agreement.

[29] In the submission of defendants' counsel, it is plain and obvious that the above defences - which depend solely on the express terms of the Franchise Agreement - are a complete answer to the first two of the alleged breaches of contract identified by the plaintiffs. Insofar as the alleged breach of an obligation to provide warranties and guarantees is predicated on a continuing obligation of Midas to sell its products to the Franchisees, they would also exclude the possibility of a finding that such a breach had occurred.

[30] To the extent that the plaintiffs' claim that Midas had no right to discontinue sales to the Franchisees was based on the interpretation of section 3.2 (a), counsel for the defendants were, in my judgment, correct in their submission that, independently of the duty of good faith, the section cannot reasonably be interpreted as imposing a duty on Midas to continue selling products however commercially unfeasible or unprofitable this might be. Notwithstanding the c*ontra proferentem* rule of construction, I do not believe the section could reasonably be interpreted as meaning that, while Midas could discontinue the sale of some products if this would, in its opinion, be no longer profitable, or commercially justifiable, it must continue selling some other products irrespective of their lack of profitability. In this connection, I note that, in their reply to the statement of defence, the plaintiffs admit that, by 2003, the manufacturing and distribution business of Midas was suffering financially from the use of stainless steel exhaust systems in new automobiles and the fact that Franchisees were choosing to buy automotive parts from other sources.

[31] I am also in agreement with defendants' counsel that it follows that the third of the alleged breaches cannot be sustained.

[32] Similarly, whether or not provision for the 14.5% discount was originally contained in the draft of the new Agreement provided to the Franchisees – as the communication from Midas in 1980 suggests - it was not included in the final version and its abolition did not breach any of the express terms of the Franchise Agreement. Nor was there any express obligation on Midas to provide an equivalent product supply system in the event that it ceased to sell products.

[33] In short, the plaintiffs' contention that Midas was not entitled to eliminate its system of supplying products to the Franchisees, and to substitute another system, is without adequate support in the pleading and the express terms of the Franchise Agreement.

(iv) Breach of the contractual duty of good faith

[34] It has been said that one of the characteristic features of franchise agreements is that the complex, long-term business relationship they create is such that their terms are necessarily incomplete: Hadfield, *"Problematic Relations: Franchising and the Law of Incomplete Contracts"*, (1992), 42 Stan. Law Rev. 927, at 947-948. The Franchise Agreement in this case says nothing about the rights and obligations of the parties in the event that Midas ceased to supply its products to the Franchisees. It does not follow that Midas was free to disregard their interests. The obligations of good faith and fair dealing in matters left to its discretion require otherwise.

[35] As I have indicated, I am satisfied that the question whether causes of action for breach of contract have been disclosed turns on whether, solely on the basis of the facts pleaded, the plaintiffs have any chance of success in establishing that Midas breached its contractual obligation to exercise its discretions under the Franchise Agreement in good faith.

[36] As I have found that Midas was entitled under the Franchise Agreements to cease supplying products to the Franchisees, and as the plaintiffs have admitted that the manufacture

and distribution of such products had become unprofitable for Midas, I do not believe the decision to negotiate an alternative distribution system with another supplier could, by itself, be a breach of the duty of good faith. The strength of the plaintiffs' case, such as it is, depends on the manner in which the decision to do this was implemented.

[37] In the ultimate analysis, the case for the plaintiffs is that the changes in the product supply system implemented by Midas have been so radical and detrimental to their commercial and financial interests, and have effected such a fundamental departure from the relationship between the parties that was - and still is - contemplated by the Franchise Agreement, as to require a conclusion that there has been a breach of the duty of good faith and fair dealing. It is, in my opinion, evident that the task of deciding this question at trial will depend on a complex analysis and weighing of the facts and the respective interests of the parties. My task is different. It is to decide whether it is plain and obvious that the facts as pleaded could not justify a decision by the trial judge in favour of the plaintiffs and the class. On a matter involving commercial interests as complex as this, I believe I must be particularly sensitive to the admonition that plaintiffs should not be "driven from the judgment seat" if they have any chance of success: *Hunt v. Carey Canada Inc*. (1990), 74 D.L.R. (4th) 321 (S.C.C.), at page 332; *Transamerica*, at paras 56 -59.

[38] The alleged detrimental effects suffered by the Franchisees as a result of the change in the products supply system, and corresponding advantages obtained by Midas, include the following:

> (a) the loss of the supply system contemplated in the Franchise Agreements;
>
> (b) the loss of a 14.5 per cent discount on the purchase price of products;
>
> (c) the retention of the 10 per cent enhanced royalty by Midas notwithstanding the abolition of the discount;
>
> (d) excessive charges for products under the Uni-Select system as a result of a failure by Midas to exercise its negotiating power in the interests of the Franchisees;
>
> (e) a failure by Midas to account for, and remit to, the Franchisees amounts that exceed its expenditures under Midas warranties;
>
> (f) no abatement of the 10 per cent royalty formerly used by Midas to cover its warranty obligations notwithstanding its receipt of rebates from Uni-Select for that purpose;
>
> (g) the imposition of minimum purchasing requirements in order to obtain Midas brand products from Uni-Select;

(h) a loss of the Midas contributions to co-operative advertising;

(i) lower early payment discounts;

(j) less favourable products return privileges;

(k) loss of free products catalogues previously provided by Midas and now supplied by Uni-Select for a price; and

(l) receipt of substantial rebates and allowances by Midas in respect of the Franchisees purchases under the Uni-Select agreement and the inflationary effect of these on prices paid by the Franchisees for products.

[39] Although, in its statement of defence, Midas has denied the above allegations, for the most part they raise issues of fact which I must assume will be decided in favour of the plaintiffs. The combined weight and effect of the allegations would have to be considered at trial. In these circumstances, I do not find it necessary, or appropriate, to engage in the difficult exercise of weighing the detriment suffered by the Franchisees, as a result of the change in the products supply system, in the light of the undoubted right of Midas to give consideration and weight to its own interests. It is sufficient that I am satisfied that it is not plain and obvious that, if those allegations are proven, a finding that Midas breached the standard of good faith would be excluded. I am also satisfied that it cannot be said, on the basis of the pleadings and the documents they incorporate, that the allegations are incapable of proof to an extent that the plaintiffs could not possibly succeed in establishing a breach of the implied contractual term requiring good faith performance. As I have indicated, the requirement imposes limits on the ability of Midas to exercise its powers under the Franchise Agreement so as to effect fundamental changes in its business relationship with the Franchisees without their consent; *cf*., *Transamerica*, at paras 56-59; and *Restaurants Mikes*, at para 32.

[40] The following observation of O'Connor J.A. in *Transamerica*, at para 58 – when dealing with a motion under Rule 21 - is, in my opinion, equally applicable to the allegations in this case:

> ... striking the duty of good faith... at this point would require, at a minimum, a very detailed review of the agreement and the objectives of its contractual scheme. It would also require analysis as to how those objectives may be affected by the duty of good faith that [the respondent] seeks to have implied into the agreement. I recognize that the agreement was referred to in the pleadings and that a court can, therefore, have regard to its terms on a pleadings motion. However, it is my view that, in this case, the detailed analysis required to finally determine the issue of whether to imply a good faith duty is better left for a trial.

[41] I will, however, comment on the defendants' assertion that the terms of section 3.2 (b) provide a complete answer to the claim that the decision of Midas to eliminate the 14.5 per cent discount, while retaining a 10 per cent royalty, was a breach of its obligations under the

Franchise Agreement. If successful, this claim, by itself, could justify a finding of liability in damages, and for an abatement of the royalty in the future.

[42] Section 3.2 (b) undoubtedly gives Midas a discretion to prescribe and, from time to time, change prices at which products were sold to Franchisees. However, despite the entire agreement clause in section 10.9, the Franchise Agreement does not purport to deal with every particular aspect of - or all obligations arising under - the relationship between the franchisor and Franchisees. This is recognised in the references to the "Midas System" in the Agreement.

[43] The Midas System is no doubt intended to include the mutual rights and obligations of the parties under the Agreement, but the concept and the term as used in section 1.1 (b) are obviously intended to be more extensive. This is evident from the inclusive description in the third recital which, among other things not dealt with in the Franchise Agreement, includes matters relating to the successful operation of the Midas shops. A "successful" operation I understand to be one that is profitable. The Midas System would also include policies formulated by Midas that are referred to in section 6.15 of the Franchise Agreement and, in section 2.4, prices set by Midas are specifically referred to as aspects of the system. Such matters that form part of the Midas System and are not dealt with in the Franchise Agreement are not, in my opinion, part of the "subject matter hereof" within the meaning of section 10.9. In consequence – and independently of the allegations of bad faith - they are not affected by the entire agreement clause.

[44] Implicit in the discretion conferred on Midas under section 3.2 (b) is the power to formulate policies with respect to the pricing of Midas products. Whether or not the communications from Midas to its Franchisees in 1980 were correct in stating that the 14.5 per cent discount was included in the draft of the Franchise Agreement that accompanied them, it was not included in the final version of the agreement that was released in 1981 and was still in use when Landsbridge executed the Franchise Agreement in 2004. The discount was thus relegated to the status of a pricing policy included in the Midas System. Although Midas would have power to change the policy from time to time, this would, in my opinion, be subject to its duty to act in good faith in exercising its rights under the Franchise Agreement.

[45] On the facts as pleaded, Midas bargained for an additional royalty of five per cent in return for its implementation of a policy of providing the 14.5 per cent discount on the price of Midas products purchased by Franchisees. The communications of November 1980 state that the Franchisees would be "entitled" to the discount and that it was intended to "compensate" them for the additional 5 per cent royalty. This policy became part of the Midas System at the same time that provision was made for the additional royalty in what was described as the "New Standard Agreement" that was intended to become – and became - the contract of adhesion that new Franchisees would be required to sign. The discount was shown on the invoices presented by Midas until June 2001 and, although the policy this reflected could be abrogated by Midas at any time, it would, arguably, be a breach of its contractual obligation to exercise its powers in good faith if, as has occurred, it subsequently insisted on retaining its right to the enhanced royalty.

[46] The right conferred on Franchisees under section 1.1 (b) to use the Midas System must, in my opinion, include a right to take advantage of any policies, practices and good faith obligations of Midas incorporated in it. On the facts as pleaded, the system - as altered in 1981 - included the offset against a 10 per cent royalty. Midas had no power to increase its royalty directly and, in my opinion, it is not plain and obvious that it could in good faith do so indirectly by deleting the offset that had been used to procure the initial acceptance of the Agreement and had, in effect, been made part of the Midas System.

[47] If, as I have concluded, a court might properly find that the offset was incorporated into, and became part of, the Midas System, and that its elimination would involve a breach of the implied contractual obligation of Midas to act in good faith, the cause of action that arose would not necessarily be confined to class members who were Franchisees in 1980 when the offset was first announced. Arguably, the good faith obligation to provide the offset, or an abatement of the royalty, should be treated as having existed as part of, and an addition to, the Midas System from the time that the standard Franchise Agreements were first signed. On that basis – pursuant to sections 1.1 (b) and 3.1 (b) of the Franchise Agreement – it could be enforced as an implied contractual term by persons who became Franchisees before the Midas supply system was abandoned by the execution of the Uni-Select agreement.

[48] In addition to the significance I have attributed to the part played by the Midas System in the relationship between the parties in this case, there is a more general consideration that arises from the intended use of the form of Franchise Agreement provided by Midas in 1981 as a standard contract of adhesion that future Franchisees would be required to sign. I do not consider that it would offend principle to hold that the benefit of a good faith obligation and undertaking assumed by Midas in order to procure the initial acceptance of the Agreement should, in fairness, extend to all persons who were required to execute it subsequently in order to become Franchisees while the offset was still in place.

[49] Landsbridge, however, signed the Franchise Agreement in August 2004 after the execution of the Uni-Select agreement. In the submission of counsel for the defendants, Landsbridge cannot have causes of action arising from breaches of implied contractual duties of good faith committed before its franchise was acquired as no contractual obligations of Midas would then have been owed to it.

[50] I did not understand the submission that Landsbridge was entitled to enforce the causes of action pleaded to be based on breaches of duties owed to it before it became a Franchisee. Rather, the submission of plaintiffs' counsel was that it is fundamental to the relationship between the parties, and implicit in the provisions of the Franchise Agreement, that the rights and obligations of all Franchisees under the Agreement are to be uniform. It was in a standard form that was still in use when it was executed on behalf of Landsbridge after the change in the supply system had occurred, and there is no evidence on this motion that it has subsequently been changed. A judicial interpretation - and a determination of the effect - of the Franchise Agreement in the circumstances that have occurred will affect the interests of all Franchisees

alike. As all Franchisees are entitled contractually to share in the benefits of the Midas System, Landsbridge would be entitled to share in any changes to it that resulted from this litigation.

[51] If the above summation of the submissions of plaintiffs' counsel is correct, they are, in my judgment, insufficient to support the causes of action for breaches of an implied duty of good faith that have been pleaded. Counsel for Midas were, in my opinion, correct in their submission that it is plain and obvious that Landsbridge has no causes of action for any of the breaches that are alleged to have occurred before it became a Franchisee. To hold otherwise – and to refuse to distinguish between Franchisees who participated in the Midas distribution system and those who acquired their franchises after it was replaced by the Uni-Select agreement – would be tantamount to an attribution of legal personality to the Franchisees as a continuing group. In short, the harm caused by the breaches may be continuing but the duties allegedly breached were not owed to Landsbridge.

(b) Breach of contract – the Charter

[52] Allegations against the defendants in connection with the Charter are, I think, intended to raise issues of breach of contract. It is pleaded that the Charter imposed, and the defendants breached, obligations on Midas International (on behalf of itself and Midas) to negotiate agreements under which the combined purchasing power of Midas and its North American Franchisees would be exercised for the benefit of the latter. The obligations breached are alleged to include a duty to ensure that all supply agreements provide for rebates of at least five per cent to the Franchisees on their purchases of products under the agreements. It is pleaded that, while Midas has received, and continues to receive, substantial rebates under the Uni-Select agreement, no rebates have been provided to the Franchisees.

[53] In their pleadings, the parties affirm that, on or about October 11, 2004, the Charter was signed by Midas International and by the International Midas Dealers Association (the "International Dealers Association"). The parties are also in agreement that the membership of the latter consists of "hundreds of Midas Franchisees". The plaintiffs plead that the Charter was entered into for the benefit of all Midas Franchisees in Canada and the United States and it is implicit in their pleading that the plaintiffs and the Franchisees are entitled to enforce its terms. This is denied by the defendants who assert that the Charter is not a contract and that, in any event, the plaintiffs are not parties to it and can obtain no enforceable rights under its terms.

[54] Despite the absence of facts relating to the legal status of the International Dealers Association in the statement of claim, the terms of the Charter are incorporated in the pleading and - being described as an agreement made for valuable consideration and the mutual promises contained therein - it has the appearance of a contract between its parties. The plaintiffs and the other Franchisees are, however, not parties to the Charter and it is not pleaded that the plaintiffs are members of the International Dealers Association. I do not consider that the relationship created calls for an incremental relaxation of the requirement of privity as contemplated by Iacobucci J. in *Fraser River Pile & Dredge Ltd. v. Can-Dive Services Ltd*., [1999] 3 S.C.R. 108, at para 44. To do this would be to recognise that each of the hundreds of members of the

International Dealers Association, and all Franchisees who are not members of it, would have contractual rights to enforce provisions of the Charter. This, I believe, could not possibly have been intended or could reasonably be considered to be appropriate. It would leave virtually no room for the doctrine of privity to operate – a development that, in *Fraser River*, at para 43, was said to be beyond the scope of legitimate judicial reform. In this connection, I note that the Charter does not contain a selection of the law governing its validity, effect and interpretation and, in the absence of any pleading to the contrary, it must be assumed that the contract laws of Ontario - including the rules of privity - are applicable.

[55] There is, moreover, no allegation in the pleading that it was entered into by the International Dealers Association as an agent, or trustee, for the Franchisees and there is nothing in the pleading, or the Charter itself, to indicate how the Franchisees individually would obtain enforceable rights at common law or in equity, or that this was the intention. I note, in particular, that no facts are pleaded that would support an inference that the International Dealers Association intended to assume potentially onerous obligations of a trustee on a continuing basis with respect to the enforcement of the provisions of the Charter. Unlike the position in *Re Stelco*, [2007] O.J. No. 2533 (C.A.), there is no trust language in the document and nothing to exclude the right of the contracting parties to amend its terms: see *Greenwood Shopping Plaza Ltd. v. Beattie*, [1980] 2 S.C.R. 228, at page 239.

[56] Although the purpose of the Charter is stated to be to leverage the combined purchasing power of Midas and its franchisees to obtain supply chain agreements and economies for the benefit of the franchisees and company-owned stores, this was to be accomplished by the creation of a separate body that was to oversee the administration of the Charter. If any question relating to the respective rights, powers or responsibilities of that body arose, it would be the International Dealers Association – and not the franchisees – who would be entitled to enforce the provisions of the Charter as a contracting party.

[57] In the absence of material facts that would entitle the plaintiffs to enforce the provisions of the Charter, I find that the pleading does not disclose any cause of action of the plaintiffs arising from the alleged breaches of its provisions. If, contrary to my opinion, it is not plain and obvious that the plaintiffs have no right to enforce the provisions of the Charter, the allegation with respect to the failure of Midas to negotiate a five per cent discount on sales to the franchisees by Uni-Select would, I believe, be sufficient to give rise to a cause of action.

(c) The Arthur Wishart Act

[58] The plaintiffs have pleaded and rely on section 3 of the *Arthur Wishart Act* as a separate cause of action. They have also pleaded reliance on very similar legislation in force in Alberta and Prince Edward Island.

[59] Under the *Arthur Wishart Act*, the statutory duty of fair dealing referred to in section 3 is imposed only where the business carried on pursuant to a franchise agreement is operated, or is

to be operated, partly or wholly in the province. There are corresponding limitations in the statutes of Alberta and Prince Edward Island. These limitations are of no consequence in this case if I am correct in my view that the standard imposed by the statutes is not materially different from that of the implied term at common law.

[60] As Section 10.11 of the Franchise Agreement provides that all matters relating to its validity, construction, performance and enforcement are to be governed by the laws of Ontario, the common law rule of construction will apply to the Franchise Agreements whether the businesses operated under them are carried on in Ontario or elsewhere in Canada. Section 3 of the *Arthur Wishart Act* gives statutory recognition to the common law rule as far as franchise businesses operated in Ontario are concerned, but neither the provisions of the statute as a whole, nor its legislative history, suggests that it was intended to restrict the duty of fair dealing and good faith that would otherwise be applicable to a Franchise Agreement by virtue of a selection of the laws of this province to govern its construction and enforcement.

[61] For these reasons, my conclusions on the effect of the common law duty of good faith apply equally to the plea of a breach of the *Arthur Wishart Act* and the statutes of Alberta and Prince Edward Island, with the proviso that, unlike the common law duty, the statutory obligations would, it appears, be confined to franchise businesses operated, at least in part, in the relevant province.

(d) Unjust Enrichment

[62] The plaintiffs' claim based on unjust enrichment presupposes that the three requirements approved in *Pettkus v. Becker*, [1980] 2 S.C.R. 834, at page 848, for the grant of a restitutionary remedy have been satisfied. In order to succeed, the plaintiff must prove that:

1. The defendant has been enriched;

2. The plaintiff has suffered a corresponding deprivation; and

3. There was no juristic reason for the enrichment.

[63] For the purposes of section 5 (1) (a), the question is to be decided solely on the facts as pleaded and, unless it is plain and obvious that one or more of the requirements would not be satisfied, a cause of action will have been disclosed.

[64] As in other parts of the statement of claim, the plaintiffs do not distinguish clearly between obligations and benefits obtained by Midas and Midas International, respectively. The

claims for unjust enrichment are made against both of them without specifically distinguishing between benefits received by each. Their enrichment is alleged to have arisen from the unlawful and unjustified receipt of rebates and allowances from suppliers of products under the new distribution system, and the retention of the 10 per cent royalty.

[65] As far as the royalty is concerned, I am satisfied that a cause of action of 405 for unjust enrichment has been sufficiently pleaded. If the facts pleaded, and a breach of the duty of good faith, are proven, Midas will have been enriched by the retention of the enhanced royalty, 405 will have suffered a corresponding deprivation and there will have been an absence of a juristic reason for the enrichment.

[66] The claim in respect of the increased revenue the defendants have received from alleged unlawful and unjustified receipts of rebates and allowances from product suppliers stands on a different footing. Counsel for the defendants were, I believe, correct in their submission that the alleged deprivation consisting of higher prices that the Franchisees have been forced to pay under the new distribution system, and a loss of benefits under the Midas system, do not constitute a corresponding deprivation. Assuming as I must, that the new system produces advantages for Midas and disadvantages to the Franchisees, and that in implementing it, Midas breached its contractual obligations to the Franchisees, it does not follow that there is the necessary correspondence between the advantages and disadvantages to justify the grant of a restitutionary remedy that would attach a constructive trust to the amounts received by Midas. In this connection, counsel referred to, and relied on, *Boulanger v. Johnson & Johnson*, [2003] O.J. No. 2218 (C.A.), at para 20, where Goudge J.A. referred to, and applied, a passage in the reasons of McLachlin J. in *Peel (Regional Municipality) v. Canada*, [1992] 3 S.C.R. 762 in which it had been argued that the remedy could extend to benefits that the plaintiffs indirectly conferred on the defendants. The learned judge stated, at para 58:

> This the courts have declined to do. The cases in which claims for unjust enrichment have been made out generally deal with benefits conferred directly and specifically on the defendant, such as the services rendered for the defendant or money paid to the defendant.

[67] Similarly, there is, in my judgment, an insufficiently direct and clear correlation between the numerous disadvantages allegedly suffered by the Franchisees, and the benefits obtained by Midas, under the Uni-Select agreement.

[68] Accordingly, the cause of action for unjust enrichment in this case must be limited to the claim for restitution of the additional royalties of five per cent paid after the termination of the Midas distribution system. The cause of action is that of 405 and not that of Landsbridge as, if – as I have found - there was no breach of a duty of good faith owed to Landsbridge, the pleading would not disclose an absence of a juristic reason for the royalties it has paid in accordance with section 4.1 of the provisions of the Franchise Agreement.

2. Section 5 (1) (b) - the Class

[69] The plaintiffs seek to represent a class consisting of:

> All corporations, partnerships and individuals carrying on business in Canada as a franchisee on or after May 31, 2007 under a Midas Franchise and Trade Mark Agreement.

[70] May 31, 2007 is the date on which the action was commenced. Persons who ceased to be Franchisees before that date would not be in the class as defined even though they may have the same causes of action against the defendants as the members of the class. It was not suggested by counsel for the defendants that the definition is objectionable as being arbitrarily under-inclusive. In *Pearson v. Inco Ltd.* (2006), 78 O.R. (3d) 641 (C.A.), at para 61, Rosenberg J.A. stated that the principle that a proposed class should not be under-inclusive must be approached with considerable caution. In other cases I have questioned whether there is any statutory or policy justification for such a principle and whether it is supported by a passage in *Hollick v. City of Toronto,* [2001] 3 S.C.R. 158, at para 21 that has sometimes been cited as an authority for it. Generally, I do not see why, as a condition for certification, plaintiffs should be compelled to include every person who shares in the common issues. It is, for example, accepted that geographic limitations are permissible and I see no reason why other limitations should be rejected. In any event, I believe it was not unreasonable for the plaintiffs in this case to limit the class they wish to represent to those persons who will have a continuing interest in the franchise relationship and in the respective rights and responsibilities of Midas and the Franchisees.

[71] The class is obviously determinable by an objective standard. As proposed, however, it would include persons who acquired their franchises after the agreement with Uni-Select was effected. For the reasons given in connection with the claims of Landsbridge, such Franchisees do not have the causes of action that have been pleaded and, in consequence, they do not share in the common issues raised by the causes of action.

[72] Accordingly, the class must be limited to those who were Franchisees at the date of the Uni-Select agreement as well as on May 31, 2007.

[73] The above conclusion is without prejudice to any claims that the persons I have excluded may be entitled – pursuant to section 3.1 (b) of the Franchise Agreement, or otherwise - to share in any changes to the Midas system that are made following the outcome of this litigation.

3. Section 5 (1) (c): Claims Raising Common Issues

[74] In the elaborate list of common issues proposed by the plaintiffs it is assumed that all of the purported causes of action they have asserted are adequately disclosed in their pleadings. Issues that relate only to causes of action that I have rejected do not arise in the proceeding and will not be included in any certification order that is made. The remaining issues can be reformulated as follows:

> 1. Did Midas breach its obligations to the class members by reason of a common law duty to exercise its rights under the Franchise Agreement honestly, fairly and in good

faith, or its statutory duties of fair dealing, by terminating the Midas product supply system and substituting and implementing the Uni-Select agreement, including, without limitation, by:

> (i) retaining the full 10 per cent royalty after it ceased to sell automotive products and accessories ("Products") to class members;
>
> (ii) negotiating and receiving rebates, allowances or other consideration from third party suppliers of products on account of the class members' purchases of Products; or
>
> (iii) funding its warranty obligations, in whole or in part, through rebates provided by a third party suppliers of Products?

2. Has Midas been unjustly enriched at the class members' expense by retaining the full 10 per cent royalty after it ceased to sell Products to class members?

3. In the event that Midas breached any of its contractual or statutory duties referred to in 1., what is the appropriate measure of the damages, if any, to which members of the class are entitled?

4. Are the class members entitled to either or each of:

> (a) a rebate of part of the royalties paid by them after Midas ceased to sell Products to class members, and, if so, in what amount; and
>
> (b) an abatement of royalties to be paid by them in the future and, if so, in what amount?

5. Are the class members entitled to declaratory or injunctive relief in respect of all, or any, of the breaches referred to in 1. that are found to have occurred, including an order for an accounting or audit of rebates and allowances received by Midas from third party suppliers of Products and amounts expended by Midas in discharging its warranty obligations?

6. Should Midas be required to pay punitive, exemplary or aggravated damages to the class members? If so, what is the amount of such damages?

[75] The requirements of a rational connection between the class definition and the common issues, and that each of the class members has at least a colourable claim to share in the above issues - other than 1. - are, in my judgment, satisfied. In respect of issue 1., the requirements are satisfied for the subclass consisting of members who were also Franchisees at the time Midas entered into the Uni-Select supply agreement.

[76] I am also satisfied that a trial of the common issues, as reformulated above, will substantially advance the litigation of the claims that raise the causes of action that have been disclosed in the pleadings. Contrary to the submission of defendants' counsel, these causes of action are not based on allegations that the provisions of the Franchise Agreement are ambiguous to an extent that parol evidence of the expectations of each of the Franchisees, and individual discoveries, will be required.

[77] If the breaches of contractual duties on which the plaintiffs rely are proven, each of the class members will be entitled to damages to place it in the same position as if the breach had not occurred. This, however, relates to the assessment of damages. Liability will have been established. In this respect, the position is similar to that in *Cassano v. Toronto-Dominion Bank*, [2007] O.J. No. 4406 (C.A.) where Winkler J.A. stated (at para 42):

> ... the determination of the common issue relating to the breach of contract question will determine liability to all members of the class, with the only possible remaining issue being that of damages.

[78] As reformulated, the common issues are, in my judgment, acceptable for the purpose of certification.

4. Section 5 (1) (d) - the Preferable Procedure

[79] In *1176560 Ontario Limited v. The Great Atlantic & Pacific Co. of Canada Ltd,* [2002] O.J. No. 4781 (S.C.J.) ("*A & P*"), Winkler J. stated, at para 26:

> In my view, where a plaintiff has met the evidentiary burden of establishing that there is an identifiable class and common issues, can state a narrow issue that is common to the entire class, and is as significant to the resolution of each individual claim as is the case here, then he or she has established a basis for a determination that a class proceeding is the preferable procedure. This determination remains, consistent with the Supreme Court's holding in Hollick, subject to the court finding that the proceeding would achieve one or more of the goals of [the] Act or, conversely, a showing by the defendants that a class proceeding is not the preferable method of dealing with the claims.

[80] Of the three goals or objectives of the CPA, access to justice for the class members will, in my opinion, be served by certification of the proceeding. As was recognised in *A & P*, and other cases, there is an "inherent vulnerability in the dependent ongoing nature of the relationship

between franchisor and franchisee" that may militate against a willingness to commence an individual action: *A & P*, at paras 41-42 and 54.

[81] Behavioural modification is also a relevant factor as in most cases in which a course of conduct that is continuing is alleged to involve breaches of the defendant's obligations of good faith and fair dealing. The reaction of Midas to this litigation – as well as the answers given by its chief financial officer in cross-examination - underlines the importance of this goal as well as the power imbalance in the relationship between a franchisor and franchisees.

[82] Judicial economy will obviously be served by the resolution of the common issues I have accepted in one trial rather than in multiple proceedings by Franchisees individually. In the submission of defendants' counsel, these advantages of the procedure under the CPA are dwarfed by a "multitude" of individual issues that will be required in any determination of liability, as well as damages. In view of the fact that the common issues are, for the main part, directed at the conduct of Midas, counsel's submission is, I believe, a considerable overstatement; *cf., Rumley v. British Columbia,* [2001] 3 S.C.R. 184, at para 36.

[83] In determining at trial whether the specific, or combined, instances of such conduct constituted breaches of an implied term - or statutory obligation - of good faith, there will necessarily have to be evidence of its economic effects on the business operations of the class members. It does not follow that it will be necessary to conduct an inquiry into the economic consequences for each Franchisee, or that orders for discovery of all, or a significant number, of Franchisees will be appropriate. The terms of the Franchise Agreement are the same for all class members and the benefits of the Midas system are to be available to each of them to the same extent. The allegations of breach of duty similarly relate to the effect of Midas' alleged changes to the product supply system on all class members. Both the allegations relating to the conduct of Midas and those with respect to the consequences for the Franchisees are essentially systemic. The weight, if any, to be given to these allegations will be determined at the trial of common issues and the remaining issues to be decided individually will, as I have already indicated, relate to the assessment of damages.

[84] A determination of a damages award - or the amount recoverable for unjust enrichment - in respect of the retention of the royalty of 10 per cent – is likely to require nothing more than an exercise in accounting and the trial judge will determine the measure of damages in respect of other breaches proven, and will have the authority under section 25 of the CPA to stipulate the procedures to be followed in assessing the damages: see *Cassano,* at para 64.

[85] I am satisfied that, from the viewpoint of the goals or objectives of the CPA, certification as a class proceeding will have considerable advantages over individual trials of all issues - the alternative supported by counsel for the defendants. It does not flow from the fact that individual proceedings have been commenced by a number of Franchisees that this would be the preferable procedure for those who would prefer to take advantage of that contained in the CPA.

5. Section 5 (1) (e) - Representative Plaintiffs with a Litigation Plan

(a) The class representatives

[86] The plaintiffs are proposed as the representatives of the class.

[87] As I have found that the pleadings do not disclose that Landsbridge has any cause of action against the defendants, it is not, in my opinion, an appropriate class representative. As mentioned earlier in these reasons, Midas has made an application to petition Landsbridge into bankruptcy. At the time of the hearing, the application had not been heard. Plaintiffs' counsel indicated that, if the petition is successful, they would be likely to propose a substitute representative plaintiff for Landsbridge. Mr Gordon Buttinger, the current secretary and treasurer of the Canadian Midas Dealers Association, has indicated his willingness to act as a class representative if this is necessary. If this proceeding continues and it is proposed to substitute Mr Buttinger, his corporation or another person to replace Landsbridge, 405 should move for that purpose.

[88] Mr Daniel McGolrick - the President of 405 – swore an affidavit and deposed as to the alleged facts that have given rise to the litigation, the impact that the change in the product supply system has had on the profitability and viability of the businesses operated by class members, and their inability to afford the investment of time, money and managerial resources needed to advance a case of this nature and magnitude individually. He stated that the disparity between the defendants' resources and levels of sophistication would make any individual actions by class members a complete mismatch. In a supplementary affidavit, he indicated that he has been informed by the few franchisees who have commenced their own actions that they would have preferred to join in this proceeding.

[89] Mr McGolrick referred also to the subservient nature of the Franchisees' relationship with Midas and certain communications that Midas has made to all of them in connection with the litigation, and for which retractions have been, or are to be, requested by plaintiffs' counsel. He indicated that representatives of the Canadian Midas Dealers Association have been assisting the plaintiffs and their counsel in preparing the case, communicating with the class members, and collecting funds from them to pay for disbursements. He deposed to his real and genuine interest in resolving the issues in the lawsuit for the benefit of the Franchisees.

[90] The defendants have not challenged the ability of 405 to represent the class if the proceeding is certified other than to allege that - having become a Franchisee a few months after the communications of November 26, 1980 and January 28, 1981 in which the offsetting effect of the 14.5 per cent discount was announced - 405 did not receive them. For the reasons already given, I do not consider that to be fatal to its right to participate in the Midas system or to exclude the possibility that 405 has a cause of action in respect of the retention of the full enhanced royalty by Midas as well as the more general claims of bad faith and unfair dealing.

[91] The case is one of considerable importance to the Franchisees and the indications are that it will be defended strongly, and even aggressively, by Midas. I see no reason to question the genuineness of the evidence of Mr McGolrick and the commitment of 405 to advance the interests of the class in this proceeding. Mr McGolrick denied that 405 has any conflicts of interest with the class members and there is nothing in the record to suggest that conflicts may arise in the future.

[92] As well as the steps taken to collect funds from class members for disbursements, the proceeding has been approved for funding by the Law Foundation of Ontario.

(b) The litigation plan

[93] Defendants' counsel levied a number of criticisms at the litigation plan proposed on behalf of the plaintiffs. Some of these are moot given my refusal to accept certain of the causes of action on which the plaintiffs have relied in their pleading. Others are, I believe, well-founded although I do not accept the submission that the flaws in the plan are "incurable". The principal deficiency arises from an apparent assumption that it will be possible to compute damages on a global, or aggregate basis, by reference to amounts and other benefits received by Midas. This may well be possible in connection with the claims relating to royalties improperly charged to the class members but I do not see how it will necessarily - or likely - be possible to assess damages globally in respect of other breaches of duty that are found to have occurred. To this extent, there is, in my opinion, a gap in the plan.

[94] Section 6.1 of the CPA provides that certification is not to be refused solely because an individual assessment of damages will be required. Even if the trial judge should find that there are other individual issues to be determined, section 25 provides the court with broad powers to fashion summary methods of dealing with them as well as with the assessment of damages. Given the systemic nature of the conduct of Midas that is alleged to have breached the duties owed to class members, it is not apparent to me what those other individual issues would be.

[95] As it stands - and contrary to the submissions of defendants' counsel - I do not consider that the gap that counsel has identified casts doubt on the manageability of the proceeding, and the preferability of an application of the procedure under the CPA. In the circumstances, I believe the plan sufficiently satisfies the requirement in section 5 (1) (e) that it be "workable", and I do not consider that it is necessary to require 405 to fill the gap in its provisions at this stage. It should, however, be amended to bring it up to date by deleting steps, such as the delivery of a statement of defence, that have been taken since the plan was drafted.

CONCLUSION

[96] In my judgment, each of the requirements for certification has been satisfied, albeit on the basis of causes of action more narrow than those on which the plaintiffs relied. Section 8 of the

CPA governs the contents of the certification order. If any questions relating to the terms of the order, or its form, arise they can be disposed of at a case conference. Although not required by section 8, it is customary for the form of the notice to be given pursuant to section 17, and the method of its dissemination, to be included in a certification order. Any issues relating to the court's approval of these matters, and any submissions of counsel in connection with my reformulation of the common issues, may also be dealt with at a case conference.

[97] If the parties are not able to agree on the costs of the motion, the plaintiffs' submissions should be made in writing within 14 days of the release of these reasons, and the defendants will then have a further 10 days in which to respond.

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CULLITY J.

Released: March 26 , 2009

COURT FILE NO.: 07-CV-333934 CP
DATE: 20090326

ONTARIO

SUPERIOR COURT OF JUSTICE

B E T W E E N:

LANDSBRIDGE AUTO CORP. AND 405341 ONTARIO LIMITED

Plaintiffs

- and -

MIDAS CANADA INC. AND MIDAS INTERNATIONAL CORPORATION

Defendants

REASONS FOR DECISION

CULLITY J.

Released: March 26, 2009