

Court File No.

COURT OF APPEAL FOR ONTARIO

B E T W E E N:

1250264 ONTARIO INC.

Plaintiff
(Respondent)

and

PET VALU CANADA INC.

Defendant
(Appellant)

Proceeding under the *Class Proceedings Act, 1992*

NOTICE OF APPEAL

THE APPELLANT, PET VALU CANADA INC., APPEALS to the Court of Appeal from the judgment of the Honourable Justice E. Belobaba (the "**Motion Judge**") dated January 7, 2015, made at the Superior Court of Justice, Ontario (Toronto) in Court File No. CV-09-392962-CP (the "**Judgment**").

THE APPELLANT ASKS that the Judgment that found a breach of the duty of good faith regarding disclosure of volume rebate information as set out in common issues 6(i), (iii) and (iv) be set aside and that judgment be granted in favour of Pet Valu on those common issues, and common issue 7 regarding damages, thereby dismissing these remaining common issues with costs to the Appellant.

THE GROUNDS OF APPEAL are as follows:

I. History

1. The appellant, Pet Valu Canada Inc. ("**Pet Valu**"), is a wholesaler and retailer of pet food, supplies and related services. The plaintiff, 1250264 Ontario Inc. ("**125**"), is a former Pet Valu franchisee.

- 2 -

2. 125 is the representative plaintiff in a class proceeding brought against Pet Valu that focuses on whether Pet Valu was obliged to share volume rebates with its franchisees and if so, the amount of volume rebates that Pet Valu was obligated to share.
3. By Order dated June 29, 2011, seven common issues were certified. In particular:
 - a. common issues 1 through 5 focused primarily on the question of whether Pet Valu had a contractual duty to the Class Members to share volume rebates with them and if so did it breach that duty; and
 - b. common issues 6 and 7 focused on whether Pet Valu had a duty under section 3 of the *Arthur Wishart Act (Franchise Disclosure) 2000*, S.O. 2000, c. 3 (the "*Wishart Act*"), or the common law, to disclose certain information regarding volume rebates to the Class Members, and if so, what, if any, would be the appropriate damages.

All common issues are set out at **Appendix "A"** to this Notice of Appeal.

4. Pet Valu moved for summary judgment dismissing all of the common issues. By judgment dated October 31, 2014 (the "**October 2014 Judgment**"), the Motion Judge:
 - a. granted summary judgment in favour of Pet Valu on common issues 1 through 5, and held that that all of the volume rebates were passed on and shared with the franchisees;
 - b. reserved judgment on the common issues 6 and 7, after stating that he was "*initially of the view that*" they should be answered "*No.*";
 - c. suggested that an amendment to the common issues be considered, to add a new common issue (#8) to deal directly with an allegation that Pet Valu misrepresented to franchisees the extent of its purchasing power. (125 accepted this suggestion and advised that it would move to amend its statement of claim and certify a new common issue); and

- 3 -

- d. directed that 125's motion be heard in December 2014, and explained that:
 - (i) If 125 prevails on its motion, common issues 6 and 7 "*will likely be answered 'No'.*" but (ii) If 125 does not prevail, then both parties would be permitted to complete their submissions on those common issues.

II. The Judgment under appeal

5. In the Judgment under appeal, the Motion Judge:

- a. dismissed 125's motion to amend its pleading and add a new common issue;
- b. held that Pet Valu had a duty under section 3 of the *Wishart Act* to disclose to franchisees certain information regarding volume rebates, and that Pet Valu breached that duty. The Motion Judge therefore granted judgment to 125 on common issues 6(i), (iii) and (iv); and
- c. requested further oral or written submissions regarding what damages, if any, are payable for the breach of that duty (common issue 7), to be scheduled at a subsequent case conference.

III. Grounds for appeal

6. The Motion Judge erred in law by concluding that Pet Valu owed a duty under section 3 of the *Wishart Act* to disclose the following information to franchisees:

- a. whether Pet Valu received "*significant*" volume rebates (common issue 6(i));
- b. the amount of volume rebates that it received (common issue 6(iii)); and
- c. the amount of volume rebates which it retained or shared (common Issue 6(iv)).

- 4 -

7. In particular, the Motion Judge erred in law by:
- a. concluding that there is a duty of ongoing disclosure within the statutory duty of good faith and fair dealing in section 3 of the *Wishart Act*;
 - b. imposing an ongoing disclosure regime onto the *Wishart Act* despite the fact that the language of the legislation does not provide for one;
 - c. imposing greater obligations of disclosure concerning volume rebates than those that are imposed in the regulations of the *Wishart Act*;
 - d. finding a breach of the duty of good faith and fair dealing, which applies only to the performance and enforcement of the contract, where there was no contractual obligation in respect of the disclosure of information concerning volume discounts;
 - e. making contradictory findings in stating that section 3 of the *Wishart Act* is a codification of the common law, then determining that it is broader than the common law;
 - f. determining in a production motion that Pet Valu need not produce volume rebate information regarding other franchisees or corporate stores on the basis that it was not relevant to the common issue hearing, then concluding that Pet Valu owed a good faith duty to disclose the very information he had earlier determined was not relevant;
 - g. finding a breach of the duty of good faith and fair dealing despite also finding, with respect to Pet Valu's treatment of franchisees, that:
 - (i) the objectives of the contract were not eviscerated or defeated;
and
 - (ii) the bargained object and benefits contracted for were not substantially nullified, nor did the franchisees suffer any harm contrary to the original purpose and expectation of the parties;

- 5 -

- h. granting judgment to 125, where no motion for judgment by 125 was before the Court.
8. The Motion Judge further erred in law by re-writing certified common issue 6(i) to add the words "*significant level of*" to the description of volume rebates.
 9. The Motion Judge made errors requiring appellate intervention by making factual findings that were not supported by the evidence. In particular, the Motion Judge held as follows without supporting evidence:
 - a. that information concerning volume discounts constituted a "material fact";
 - b. that Pet Valu "*decided for its own purposes to keep the volume discount information to itself and not tell its franchisees,*" and that Pet Valu "*[hid] or refus[ed] to disclose*" such information;
 - c. that the volume discounts received by 125 over the Class Period were "*meagre*"; and
 - d. that the statement in Franchise Disclosure Document that Pet Valu "*was able to take advantage of volume discounts offered by suppliers*" meant that Pet Valu was promising "*meaningful*" discounts to franchisees;
 10. The Motion Judge made palpable and overriding errors in fact regarding his conclusions, including the following:
 - a. the Motion Judge failed to consider or account for the evidence of: (i) the other significant discounts (such as co-op and I&E discounts) that Pet Valu provided to 125 over the Class Period, and (ii) the other financial benefits that Pet Valu provided gratuitously to franchisees (such as free returns on expired products and foreign exchange relief); and
 - b. the Motion Judge held that, by failing to provide information to franchisees regarding volume rebates, Pet Valu ran afoul of an obligation to "*obtain lower prices for the benefit of all Pet Valu stores by purchasing in larger*

- 6 -

quantities on a centralized basis", contrary to his previous finding that Pet Valu actually provided products to franchisees at prices 6 to 14% cheaper than competitors.

11. The Motion Judge made further palpable and overriding errors of fact, upon which he based certain conclusions relating to the finding that Pet Valu hid, withheld, and refused to disclose information, as follows:

- a. the Motion Judge erroneously found that Pet Valu "*rebuffed*" a request by 125 in 2009 for information about volume rebates; and
- b. the Motion Judge erroneously concluded that Pet Valu ignored requests for information about volume rebates by franchisees before signing releases

12. The Motion Judge erred in law by holding that any damages were potentially recoverable for the breach of the duty of good faith and fair dealing described at paragraph 5(b), above.

13. This court has jurisdiction:

- a. Under s. 6(1)(b) of the *Courts of Justice Act*, RSO 1990, c. C. 43;
- b. The Judgment from which the appeal is taken is final in nature; and
- c. leave to appeal is not necessary.

February 3, 2015

Cassels Brock & Blackwell LLP
2100 Scotia Plaza
40 King Street West
Toronto, Ontario M5H 3C2

Geoffrey B. Shaw LSUC#: 26367J
Tel: 416-869-5982
Fax: 416-350-6916

- 7 -

Derek Ronde LSUC#: 46978W

Tel: 416-869-5428

Fax: 416-640-3063

Eric Mayzel LSUC#: 58663P

Tel: 416-860-6448

Fax: 416-642-7144

Lawyers for the Defendant (Appellant)

TO:

SOTOS LLP

Barristers and Solicitors

180 Dundas Street West

Suite 1250

Toronto, ON M5G 1Z8

Louis Sokolov LSUC #: 34483L

Jean-Marc Leclerc LSUC #: 43974F

Tel: 416.977.0007

Fax: 416.977.0717

Lawyers for the Plaintiff (Respondent)

Appendix "A" – Common Issues

- 1) Has the defendant breached its contractual duty to the Class Members at any time during the Class Period by failing to share Volume Rebates with them?
- 2) If the answer to common issue # 1 is yes, has the defendant breached its contractual duty to the Class Members at any time during the Class Period by:
 - a) charging a mark-up on private label products without giving Class Members credit for their proportionate share of Volume Rebates in respect of such products.
 - b) imposing a distribution charge on the price of products without giving Class Members credit for their proportionate share of Volume rebates in respect of such products?
- 3) Has the defendant breached the duty of fair dealing to the Ontario Class Members under section 3 of the *Arthur Wishart Act (Franchise Disclosure) 2000*, S.O. 2000, c. 3 (the "AWA") by any of the conduct described in common issues 1 and 2 above, if so found?
- 4) If the conduct described in common issues 1 and 2 above did not constitute a breach of the Franchise Agreement, has the defendant been unjustly enriched by such conduct, if so found?
- 5) What is the aggregate amount of damages for the breaches of any of the duties referred to in common issues 1, 2 and 3 above, or the aggregate amount of compensation for unjust enrichment, if so found?
- 6) Did the defendant have a duty at common law to the Class Members or under section 3 of the AWA to the Ontario Class Members to disclose the following information to the Class Members or to some of them, and if so, did it breach such duty:
 - i) whether the defendant or its affiliates receives Volume Rebates in respect of purchases which are made by the defendant or its affiliates for wholesale to the Class Members;
 - ii) the defendant's policy in respect of the allocation of Volume Rebates to Class Members and, in particular, whether the defendant complied with sections 22(e) and (f) and 23(c) of the Franchise Agreement;
 - iii) the amount of Volume Rebates received by the defendant or its affiliates during the Class Period;
 - iv) the amount of Volume Rebates retained by the defendant or its affiliates and the amount, if any, that was shared with Class Members;
 - v) the criteria that were used by the defendant to determine how much of the Volume Rebates were retained and how much, if any, were shared with the Class Members?
- 7) If the answer to common issue 6 is yes, is the plaintiff entitled to an order requiring the defendant to disclose such information forthwith and what damages, if any, is the defendant required to pay for the breach of such duty?

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Cassels Brock & Blackwell LLP

2100 Scotia Plaza
40 King Street West
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Geoffrey B. Shaw LSUC #: 26367J

Tel: 416.869.5982

Fax: 416.350.6916

gshaw@casselsbrock.com

Derek Ronde LSUC #: 46978W

Tel: 416.869.5428

Fax: 416.640.3063

dronde@casselsbrock.com

Eric Mayzel LSUC #: 58663P

Tel: 416.860.6448

Fax: 416.642.7144

emayzel@casselsbrock.com

Lawyers for the Defendant (Appellant)