COURT OF APPEAL FOR ONTARIO

CITATION: 1250264 Ontario Inc. v. Pet Valu Canada Inc., 2016 ONCA 24
DATE: 20160114
DOCKET: C59956

Hoy A.C.J.O., MacFarland and Lauwers JJ.A.

BETWEEN

1250264 Ontario Inc.

Plaintiff (Respondent/
Appellant by way of cross-appeal)

and

Pet Valu Canada Inc.

Defendant (Appellant/
Respondent by way of cross-appeal)

Geoffrey B. Shaw, Derek Ronde and Eric Mayzel, for the appellant/respondent by way of cross-appeal

Louis Sokolov and Jean-Marc Leclerc, for the respondent/appellant by way of cross-appeal

Heard: November 3 and 4, 2015

On appeal from the judgment of Justice E. Belobaba of the Superior Court of Justice, dated January 7, 2015, 2015 ONSC 29.

Hoy A.C.J.O.:

I OVERVIEW

[1] This appeal and cross-appeal arise in the context of a class action against a franchisor. The franchisor, Pet Valu Canada Inc. ("Pet Valu"), moved for summary judgment on the 7 common issues certified in the class action. The motion judge granted judgment in favour of Pet Valu dismissing common issues 1-5. He invited the plaintiff, 1250264 Ontario Inc. (the "plaintiff"), to move to amend its statement of claim and add an 8th common issue. The plaintiff accepted that invitation and the motion judge deferred his decision on common issues 6 and 7 until the plaintiff's motion was heard. While the motion judge ultimately dismissed the plaintiff's motion to amend and add an 8th common issue on the ground of prejudice, he read language into the court-established wording of common issue 6. On the basis of the read-in language, he then found that Pet Valu had breached its duty of fair dealing under s. 3 of the *Arthur Wishart Act (Franchise Disclosure), 2000*, S.O. 2000, c. 3 (the "*AWA*") and answered common issues 6(i), (iii) and (iv) in favour of the plaintiff. Common issue 7 – damages – has not yet been determined.

[2] Pet Valu appeals the motion judge's decision answering common issues 6(i), (iii) and (iv) in favour of the plaintiff. It argues that the motion judge erred by what it characterizes as unilaterally and unfairly amending common issue 6. It also argues that the motion judge made several errors in finding that it breached

s. 3 of the *AWA*. The plaintiff cross-appeals the motion judge's dismissal of its motion to amend to add an 8th common issue.

[3] For the reasons that follow, I would allow Pet Valu's appeal, find in favour of Pet Valu on common issues 6(i), (iii) and (iv) and dismiss the plaintiff's cross-appeal. Given that I would find in favour of Pet Valu on common issues 6(i), (iii) and (iv), there is no need to answer common issue 7, which deals with the damages Pet Valu would have been required to pay if the plaintiff had succeeded on common issue 6. In the result, I would dismiss the plaintiff's action against Pet Valu.

[4] Below, I first set out the background, including the events leading to and a summary of the decision under appeal. I then proceed to the analysis that leads me to conclude that the motion judge did not err in dismissing the plaintiff's motion to amend. Next, I set out the analyses leading to my conclusions that the motion judge, in effect, improperly amended common issue 6 and erred in concluding that Pet Valu breached s. 3 of the *AWA*.

II BACKGROUND

The Plaintiff's Claim is Certified

[5] Pet Valu is a wholesaler and retailer of pet food, supplies, and related services. It has almost 300 franchised stores in Canada and almost 300 corporate stores in Canada and the United States.

[6] The plaintiff is a former franchisee. He sold his franchise at a considerable profit.

[7] The plaintiff commenced an action against Pet Valu alleging, among other things, that Pet Valu had not shared volume rebates it received from suppliers with franchisees. The action was certified as a class action on June 29, 2011. The class consists of about 150 former Pet Valu franchisees. In reasons released January 14, 2011, the certification judge concluded that the only claim advanced by the plaintiff that was appropriate for certification was its claim in relation to the volume rebates: *1250264 Ontario Inc. v. Pet Valu Canada Inc.*, 2011 ONSC 287, at para. 4.

[8] The certification judge identified the common issues arising out of the plaintiff's volume rebates claim and invited the parties to reach appropriate language to express those issues.

The Certification Judge Determines the Wording of the Common Issues

[9] The parties were unable to agree upon the wording of the common issues and, after a further hearing, the certification judge released reasons on March 28, 2011 defining "Volume Rebates" and setting out the seven common issues in relation to the volume rebates claim included in Schedule A to these reasons: *1250264 Ontario Inc. v. Pet Valu Canada Inc.*, 2011 ONSC 1941. The certification judge wrote, at paras. 3 and 4:

> My objective is to state common issues that fairly reflect the pleadings, the evidentiary record and the conclusions in my reasons. The common issues should be clear, neutrally-worded and fair to both parties. They should be phrased in such a way that their answers will advance the litigation.
>
> To serve these ends, the common issues should not be framed in overly broad terms. Nor should they be framed in overly narrow terms in a way that unreasonably constrains the ability of either party to prove or disprove the common issue.

[10] The certification judge added, at para. 8:

> In my view, the term should be defined. I used the term "Volume Rebates" in my reasons, for convenience and for definitional purposes. I made findings, however, at paras. 20 and 21, based on Pet Valu's own documentation, that Pet Valu received rebates, allowances, discounts and other negotiated price reductions from suppliers. Based on my reasons, and the evidence, it seems to me that the following is an appropriate definition that includes those items which, on the evidence, were granted to the defendant by suppliers and manufacturers as a result of its volume purchasing:
>
> > "Volume Rebates" means all volume-based rebates, allowances and discounts given by suppliers and manufacturers to Pet Valu or its affiliates and includes any direct or indirect discounts of the price at which goods are supplied to the Pet Valu system, but does not include discounts tied to the performance of individual stores.

The Motion Judge Invites the Plaintiff to Move to Amend to Add a Further Common Issue

[11] Pet Valu brought a motion for summary judgment on the seven common issues. Its motion was heard more than three years after the proceeding was certified. In the intervening period, a different judge assumed responsibility for case management of the class action.

[12] In the course of that hearing, the plaintiff focused on a portion of an affidavit of Pet Valu's CEO, Thomas McNeely, sworn June 16, 2014. The plaintiff submitted that the affidavit disclosed – for the first time – that Pet Valu had little to no purchasing power. The plaintiff argued that Pet Valu had misrepresented the nature and extent of its purchasing power. The motion judge suggested to counsel that the common issues be amended to add a new one, dealing specifically with the plaintiff's new "focus" on purchasing power. Pet Valu did not agree to this suggestion. The plaintiff advised that it would move to amend the statement of claim and add an 8th common issue dealing with purchasing power.

[13] The motion judge released reasons on October 31, 2014, dismissing common issues 1 through 5: *1250264 Ontario Inc. v. Pet Valu Canada Inc.*, 2014 ONSC 6056 (the "October Reasons"). Common issue 1 asked whether Pet Valu had breached its contractual duty to class members by failing to share Volume Rebates with them. With respect to this common issue, which the motion judge characterized at para. 2 as the "core issue", the motion judge wrote, at para. 29:

> I conclude that there were no undisclosed or "phantom" rebates; that all of the Volume Rebates were passed on and shared with the franchisees; and that the franchisor's mark-ups were not unreasonable.

[14] Indeed, the motion judge found that the average franchisee's cost for products was about 15% lower than outside distributor's prices and that Pet Valu negotiated the best price it could obtain and bestowed a range of benefits on its franchisees: at paras. 20 and 27-28.

[15] The motion judge indicated that, while he was initially of the view that common issues 6 and 7 should also be dismissed because common issue 6 was focused on the continuing disclosure under s. 3 of the *AWA* of financial information that was "arguably non-material", he would defer his ruling on them until after the plaintiff's motion to amend had been heard and decided.

The Motion Judge Dismisses the Motion to Amend

[16] That further motion was heard on December 3 and 4, 2014.

[17] While the plaintiff's new "focus" at the hearing of the summary judgment motion was on purchasing power, the plaintiff proposed to amend its statement of claim to add allegations that Pet Valu failed to disclose to its franchisees that it did not possess "substantial purchasing power" and that it did not receive "significant volume discounts" from suppliers. It asked that if its motion to amend were granted, the following be certified as common issue 8:

> Did the defendant have a duty at common law or pursuant to s. 3 or s. 5 of the *Arthur Wishart Act* to truthfully disclose to franchisees, in the disclosure document, the franchise agreement or otherwise during the course of the relationship of the parties, whether it possessed substantial or significant purchasing power and whether it received significant volume discounts offered by suppliers? [Emphasis added.]
>
> If yes, did it breach its duty or duties?
>
> If yes, what damages or remedies are the class members entitled to, if any?

[18] At the outset of the hearing, the motion judge provided an unsolicited draft of what he believed common issue 8 ought to be:

> What I expected:
>
> > 8. Did the disclosure document contain a misrepresentation about the defendant's purchasing power or about its ability to receive volume discounts for the benefit of its franchisees? If so, did the class members suffer a loss? Are the class members entitled to damages under s. 7 of the [*Arthur Wishart Act*]?]

[19] Pet Valu opposed the amendment.

[20] On December 19, 2014, the motion judge advised the parties as follows:

> I am writing to advise all counsel that I will be releasing my decision re the Motion to Amend/ add a new Common Issue in January – the decision will DISMISS the plaintiff's Motion to Amend – I would therefore invite both sides to make any further submissions re Common Issues 6 and 7 (if they wish to do so) within the next two weeks and no later than Monday January 5….

[21] Both parties made submissions.

[22] In reasons released January 7, 2015, the motion judge dismissed the motion to amend on the ground of prejudice: *1250264 Ontario Inc. v. Pet Valu Canada*, 2015 ONSC 29 (the "January Reasons"). He explained, at para. 11, that the motion "was prompted solely by the so-called revelation in the 2014 McNeely affidavit that Pet Valu has 'little to no purchasing power'". However, the motion judge acknowledged, at para. 15, that he had misapprehended the McNeely affidavit: "[o]n a fair reading of Mr. McNeely's 2014 affidavit, it is clear that he did not mean that Pet Valu had 'little to no purchasing power'". The motion judge specifically found, at para. 11, that Pet Valu in fact has significant purchasing power.

[23] At paras. 30-33, he explained further:

> The defendant's motion for summary judgment should have been concluded in full without this court suggesting and encouraging this motion to amend the pleadings and add a new common issue. Absent my judicial intervention, the summary judgment motion would have concluded and the defendant would likely have prevailed on most of the common issues.
>
> I am therefore satisfied that there is actual prejudice to Pet Valu in respect of the proposed amendments and new common issue. Pet Valu was in a position to obtain complete summary judgment on the existing common issues as well as a probable cost award against the representative plaintiff. This would have ended the litigation. The representative plaintiff (a defunct corporation) likely has no assets that can satisfy a judgment …

> I am now satisfied that the last minute addition of a pleadings motion that adds a new common issue at the end of the summary judgment hearing tilts the class proceeding in the plaintiff's favour …
>
> The motion is therefore dismissed solely on the ground of prejudice. [Emphasis added.]

The Motion Judge Reads Language into Common Issue 6

[24] As I have indicated above, the motion judge ultimately read additional language into common issue 6, as framed by the certification judge. For ease of reference, common issues 6(i), (iii) and (iv) are set out below. The language the motion judge read into common issue 6(i) is emphasized:

> 6. Did [Pet Valu] have a duty at common law to the Class Members or under section 3 of the [*Arthur Wishart Act*] 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 [Pet Valu] or its affiliates receives Volume Rebates [<u>received a significant level of Volume Rebates</u>] in respect of purchases which are made by [Pet Valu] or its affiliates for wholesale to the Class Members; …
> >
> > (iii) the amount of Volume Rebates received by [Pet Valu] or its affiliates during the Class Period;
> >
> > (iv) the amount of Volume Rebates retained by [Pet Valu] or its affiliates and the amount, if any, that was shared with Class Members … ?

[25] The motion judge explained his reason for modifying common issue 6(i) at para. 60 of the January Reasons:

> Strictly speaking, the question in 6(i) does not ask whether the franchisor "received significant volume discounts offered by suppliers" (the language in proposed Common Issue 8) but whether the franchisor "receives volume rebates." In my view, however, 6(i) should be interpreted as also asking if "significant volume discounts" were received by the franchisor. I say this for two reasons. First, counsel for Pet Valu have taken this position in their factum – that the question about "significant volume discounts" in Common Issue 8 "duplicates" existing Common [Issue] 6 and that "Pet Valu should not have to face repetitive common issues." Secondly, the more reasonable interpretation of Common Issue 6(i) in the context of this litigation is whether Pet Valu received a meaningful or significant measure of volume discounts and not just whether they received *any* amount, however meager.

[26] The motion judge did not advise the parties before releasing his reasons that he was contemplating reading additional language into common issue 6(i).

The Motion Judge Finds that Pet Valu Breached Common Issue 6(i)

[27] Common issue 6 asks whether Pet Valu breached a duty at common law or under s. 3 of the *AWA* to make disclosure regarding volume rebates to the franchisees. Sections 3(1) and (3) of the *AWA* provide as follows:

> 3. (1) Every franchise agreement imposes on each party a duty of fair dealing in its performance and enforcement.
>
> …
>
> (3) For the purpose of this section, the duty of fair dealing incudes the duty to act in good faith and in accordance with reasonable commercial standards.

[28] The motion judge examined the disclosure document provided to, and the form of franchise agreement signed by, the franchisees. While Pet Valu did not explicitly represent that it would receive significant volume rebates from suppliers, the motion judge found it had made such a representation: January Reasons, at paras. 24-25, 44-47 and 55.

[29] The motion judge also found, at para. 48, that the fact that the volume discounts were, in his words, “virtually non-existent” was a “material fact” as defined in the *AWA*. (Section 5 of the *AWA* requires the franchisor to disclose “material facts” in a disclosure document that must be provided to a prospective franchisee before it signs the franchise agreement or any agreement relating to the franchise agreement or pays any consideration to the franchisor or its associates. If it fails to do so, the franchisee may rescind the franchise agreement pursuant to s. 6. The franchisee may also sue the franchisor for damages under s. 7(1) if it suffers a loss because of the franchisor’s failure to comply in any way with s. 5. The common issues that were ultimately certified in relation to volume rebates did not ask if Pet Valu breached its disclosure obligations under s. 5 or whether the class members were entitled to rescind the franchise agreement or to damages under s. 7.) And, the motion judge found, the fact that Pet Valu did not receive significant volume discounts was not disclosed

to franchisees until August, 2012 – well into the litigation: at para. 49.[1] The motion judge wrote that the plaintiff tried to obtain this information before commencing this lawsuit but was "rebuffed."[2]

[30] The motion judge concluded, at para. 56, that Pet Valu had breached s. 3 of the *AWA*:

> In performing its contractual obligation to share volume discounts on a reasonable basis, Pet Valu had to track and record the volume discounts and share or pass them on to the franchisees by way of pricing reductions. These pricing benefits, including information about the level of volume discounts were, to say the least, important to the franchisees. By hiding or refusing to disclose information about the virtual non-existence of volume discounts – information that was "material to the matters ultimately contracted for" in the franchise agreement and was clearly related to the performance of this agreement – Pet Valu did not deal fairly or in good faith with its franchisees.

[31] Although the motion judge began his analysis at para. 41 by explaining that s. 3(1) is a codification of the common law, he ultimately held that a franchisor's duty under s. 3 of the *AWA* is broader than its common law duty, as

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[1] In his affidavit of August 3, 2012 in connection with the summary judgment motions, Mr McNeely deposed that Pet Valu did not receive significant volume based benefits from its suppliers. At the time, the issue was the plaintiff's alleged entitlement to volume-based benefits. Pet Valu's position was that it was not required to pass on volume-based benefits to its franchisees, but in fact did so.

[2] In a letter to Pet Valu dated November 4, 2009, the plaintiff expressed concern about the return on its investment. It asserted that Pet Valu was obligated to share volume discounts with it and sought disclosure, within 14 days, of, among other things, the amount of volume discounts that Pet Valu had received. It alerted Pet Valu to the possibility of litigation. Pet Valu disputes that it "rebuffed" the plaintiff's attempts to obtain information and points to a responding letter it sent on December 1, 2009, setting out that it needed more time to gather the information due to a recent change in company ownership and that it was willing to discuss any issues raised in the November 4 letter on an ongoing basis. The plaintiff issued its statement of claim in the class action eight days later on December 9, 2009.

that duty was articulated by the Supreme Court in *Bhasin v. Hrynew*, 2014 SCC 71, [2014] 3 S.C.R. 494. The court in *Bhasin*, at para. 73, held that the common law duty of honesty in the performance of contractual agreements does not impose a duty of loyalty or disclosure. Instead, the duty imposes on the parties a "simple requirement not to lie or mislead the other party about one's contractual performance." The motion judge distinguished this case from *Bhasin* on the basis that *Bhasin* dealt with good faith in the common law and not in the context of franchise relationships and the special considerations that arise under s. 3 of the *AWA*.

[32] The motion judge held, at para. 58, that, in a franchise context, a breach of s. 3 of the *AWA* can be found if a franchisor fails to disclose important and material facts that relate to the ongoing performance of the franchise agreement. For this proposition, he relied on *Salah v. Timothy's Coffees of the World Inc.*, 2010 ONCA 673, 268 O.A.C. 279; *1159607 Ontario Inc. v. Country Style Food Services Inc.*, 2012 ONSC 881, 2 B.L.R. (5th) 315, aff'd 2013 ONCA 589; *Burnett Management Inc. v. Cuts Fitness for Men*, 2012 ONSC 3358, 4 B.L.R. (5th) 234 and *1323257 Ontario Ltd. v. Hyundai Auto Canada Corp.* (2009), 55 B.L.R. (4th) 265 (Ont. S.C.). He distinguished *Spina v. Shoppers Drug Mart Inc.*, 2012 ONSC 5563, saying that *Spina* only held that s. 3 does not impose disclosure obligations for routine or non-material information.

III DID THE MOTION JUDGE ERR IN DISMISSING THE PLAINTIFF'S MOTION TO AMEND AND ADD AN 8TH COMMON ISSUE?

[33] The plaintiff advances two arguments in support of its cross-appeal.

[34] First, it argues that the motion judge was obviously incorrect in finding prejudice on the basis that, but for the motion judge's intervention, Pet Valu was in a position to obtain complete summary judgment on the existing common issues. This, it says, was demonstrated by the motion judge's subsequent ruling in the plaintiff's favour on common issue 6.

[35] Second, it argues that neither the motion judge's intervention nor the late timing of the motion constituted prejudice warranting a refusal to amend. It says that class proceedings "evolve as they work their way through the certification and case management process and … the case management judge plays an important role in guiding the evolution of the proceeding": *Brown v. Canada (Attorney General)*, 2013 ONCA 18, 114 O.R. (3d) 355, at para. 45. And, it submits, a plaintiff may even reformulate the class definition and common issues on appeal, provided there is no procedural unfairness to a defendant: *Keatley Surveying Ltd. v. Teranet Inc.*, 2015 ONCA 248, 125 O.R. (3d) 447, at paras. 23-24.

[36] I reject these arguments.

[37] As I explain below, the motion judge's conclusion on common issue 6 was founded on what was effectively an impermissible amendment of that common

issue. The motion judge recognized that, but for his suggestion that the plaintiff move to amend its pleadings and add an 8th common issue, Pet Valu was in a position to obtain complete summary judgment on the common issues as well as a probable cost award. I agree with the motion judge that, in the circumstances, allowing the plaintiff to amend its statement of claim and add an 8th common issue would have caused an injustice to Pet Valu, not compensable in costs.

[38] While the case management judge in a class proceeding unquestionably plays an important (and challenging) role in guiding the evolution of the proceeding, that role does not permit him to descend into the arena and make a suggestion at the conclusion of an otherwise dispositive summary judgment motion as to how a plaintiff might improve its position. The motion judge acknowledged this when he dismissed the plaintiff's motion to amend: January Reasons, at para. 32.

[39] *Brown* does not assist the plaintiff. In *Brown*, the class proceeding case management judge found that the current pleading did not disclose a cause of action for breach of fiduciary duty or negligence. However, he identified how such claims might be pleaded, granted the plaintiffs leave to amend, and certified the action, subject to the plaintiffs amending their statement of claim in accordance with his framing of the questions. This court agreed with the Divisional Court that the class proceeding case management judge erred in conditionally certifying the class action in the absence of a statement of claim that disclosed a cause of

action. The effect of his doing so was to deprive the defendants of the opportunity to meaningfully respond to the application for certification.

[40] Following the passage in *Brown* that the plaintiff quotes, the court stated that, in the class action context, the power to amend the statement of claim and other aspects of the claim, such as the proposed common issues, "should be exercised with caution and restraint": at para. 45. When the amendment is sought at the conclusion of an otherwise dispositive summary judgment motion, even greater caution and restraint is called for.

[41] Nor does *Keatley* assist the plaintiff. In that case, this court was asked to determine whether the Divisional Court erred in considering revised proposals for certification that differed from those presented before the certification judge. The court concluded that it did not. The changes proposed by the plaintiff did not "fundamentally [change] the nature of the case presented … in a way that would prejudice [the defendant]" and the defendant was not at any procedural disadvantage in arguing the point. It was given an opportunity to respond. The court held that, on an appeal from an unsuccessful certification motion, the appeal court could consider a revised class definition and revised proposed common issues if the changes did not cause the defendant any prejudice or disadvantage that could not be compensated for by costs.

[42] *Keatley* therefore stands for the proposition that, at an appeal at the certification stage, a plaintiff should have some latitude to recast its case to make it more suitable for certification, provided that the defendant is afforded procedural fairness.

[43] The circumstances of this case differ materially from those in *Keatley*. In this case, the motion judge found that allowing a pleadings amendment and the addition of the newly proposed common issue 8 would cause actual prejudice to Pet Valu that was not compensable in costs: January Reasons, at paras. 29-32. I agree. As discussed above, the motion to amend was prompted by the motion judge more than three years after certification and followed the hearing of a summary judgment motion. Absent the motion judge's intervention to suggest the adding of a new common issue – which was based on his misunderstanding of the 2014 McNeely affidavit – the litigation would have concluded and the defendant would have been in a position to obtain complete summary judgment on the existing common issues. Certifying a new common issue that was fundamentally different than the issues certified more than three years before would have been fundamentally unfair to Pet Valu.

[44] Accordingly, the motion judge did not err in denying the plaintiff's motion to amend its statement of claim and add an 8th common issue.

IV DID THE MOTION JUDGE ERR IN INTERPRETING 6(i) AS ALSO ASKING IF "SIGNFICANT VOLUME DISCOUNTS" WERE RECEIVED BY THE FRANCHISOR?

[45] For several reasons, I conclude that the answer to the above question is "yes" and I would allow the appeal on this basis alone.

[46] As I have set out above, the precise wording of common issue 6(i) was determined by the certification judge after submissions by the parties and after careful consideration.

[47] The addition of the words "significant volume discounts" was material. They parrot the "significant volume discount" language in the rejected proposed amendments to the statement of claim and the proposed common issue 8. The addition of these words was tantamount to an amendment of common issue 6(i).

[48] In the absence of certified common issues asking whether Pet Valu represented to franchisees that Pet Valu received significant volume discounts and breached that representation, and whether Pet Valu had breached its disclosure obligations under s. 5 of the *AWA*, the motion judge used these words to justify those very inquiries. Then, he seemingly equated non-disclosure of the breach of that representation to unfair dealing by Pet Valu in the "performance" of the franchise agreement to find a breach of s. 3 of the *AWA*. The motion judge himself acknowledged that, had he not intervened to suggest the adding of a new common issue (or, in other words, had he not read these words into common issue 6(i) and proceeded on the basis of the common issue as originally worded),

the summary judgment motion would have concluded and Pet Valu likely would have succeeded on the summary judgment motion: at paras. 30-31.

[49] Most significantly, the motion judge recast common issue 6(i) on his own initiative, following the completion of the summary judgment motion, without advising Pet Valu that he proposed to make this change and affording Pet Valu the opportunity to make submissions. In effect, he gave judgment on an issue that was never certified. Doing so was fundamentally unfair to Pet Valu.

[50] At para. 60 of the January Reasons, the motion judge provides a summary of a submission by Pet Valu, at para. 85 of its responding factum, opposing the plaintiff's motion to amend: "the question about 'significant volume discounts' in Common Issue 8 'duplicates' existing Common [Issue] 6". The motion judge then relied on this as one of two reasons for interpreting common issue 6(i) in the manner that he did.

[51] The submission at issue read as follows: "[t]he reference to a duty of disclosure regarding "volume discounts" duplicates existing common issues #6 and 7." Common issue 6 asks if Pet Valu had a duty to disclose whether it received Volume Rebates (6(i)) and the amount of Volume Rebates received 6(iii)). There is overlap, but the motion judge's addition of the words "significant volume discounts" to common issue 6 had reaching implications that Pet Valu could not reasonably have anticipated. Pet Valu's submissions would

undoubtedly have been different if it were addressing a proposed change to the language of common issue 6, and not the proposed addition of another common issue.

[52] Moreover, if the parties had the opportunity to make submissions, the effect of the addition of the words would also have been explored. Proceeding in the manner the motion judge did deprived him of the benefit of the parties' submissions on the theory of liability he adopted in his reasons. It was not "tested in the crucible of the adversarial process": *Labatt Brewing Company Limited v. NHL Enterprises Canada*, L.P., 2011 ONCA 511, 106 O.R. (3d) 677, at para. 6, citing *Rodaro v. Royal Bank of Canada* (2002), 59 O.R. (3d) 74 (C.A.). And, as I conclude below, the motion judge's theory of liability was flawed.

V DID THE MOTION JUDGE ERR IN CONCLUDING THAT PET VALU BREACHED S. 3 OF THE *AWA*?

[53] I have explained that the motion judge erred (i) by considering whether Pet Valu had represented to franchisees that Pet Valu received significant volume discounts and had breached that representation and (ii) by effectively considering whether Pet Valu breached its disclosure obligations under s. 5 of the *AWA* in the absence of certified common issues asking those questions and in the absence of submissions by the parties on those issues. His conclusion that Pet Valu breached s. 3 of the *AWA* is rooted in a breach of what he found was a

representation that Pet Valu received significant volume discounts and an effective breach of s. 5 of the *AWA*. For that reason alone, it cannot stand.

[54] I will not comment on the motion judge's case-specific finding that the franchise agreement contained a representation that Pet Valu received significant volume discounts. For the purpose of the discussion that follows, whether his interpretation was correct or not is immaterial. (I say "correct" because in these circumstances I would not accord his interpretation deference.)

[55] Nor will I address the palpable and overriding errors that Pet Valu alleges the motion judge made in finding: (a) that Pet Valu "rebuffed" the plaintiff's request for information; (b) that volume rebates were "meagre"; and (c) that the fact that Pet Valu did not receive significant volume-based benefits from its suppliers was – in the context of the benefits that the motion judge found the franchisor did provide – a "material fact" as defined in the *AWA*.

[56] I will however comment, briefly, on the motion judge's conclusion that Pet Valu breached s. 3 of the *AWA*. In my view, even if the motion judge were correct in finding that Pet Valu represented to franchisees that it received "significant volume discounts" in disclosure documents or the franchise agreement, he cast the net of s. 3 too widely.

[57] Section 3(1) of the *AWA* imposes a duty of fair dealing on the franchisor in the "performance and enforcement" of the franchise agreement. Assuming, but

not deciding that, post-*Bhasin*, non-disclosure by a franchisor in the course of the performance or enforcement of the franchise agreement can constitute a breach of s. 3 of the *AWA*, the "non-disclosure" in this case did not amount to such a breach.

[58] *Salah* and *Country Style*, on which the motion judge relied, involved deliberate non-disclosure by the franchisor regarding the status of the lease for the franchisee's premises in the context of the contractually-provided for renewal of the franchise. In both cases, the franchisor's conduct arose squarely within the "performance" of the franchise agreement.

[59] In my view, the same cannot be said in this case. If indeed material, the information that the motion judge found Pet Valu should have disclosed was information that should have been disclosed <u>before</u> the appellants became franchisees. The motion judge did not imply a contractual obligation to provide ongoing disclosure regarding the level of volume discounts (and I see no basis in the franchise agreement or disclosure document for doing so.) And there was no indication that non-disclosure once the appellants became franchisees adversely affected them in any way. How, then, can Pet Valu be said to have not dealt fairly or in good faith in the performance of the franchise agreement?

[60] This case is more like *Spina*. In *Spina*, Perell J. found that it was plain and obvious that what he characterized as a "pre-litigation oriented duty of disclosure"

went well beyond the scope of s. 3. The franchisee alleged that the franchisor breached s. 3 of the *AWA* by failing to disclose financial information necessary for the franchisees to verify whether the franchisor was meeting its obligations under the franchise agreement. Perell J. wrote at para. 218:

> The Plaintiffs would require [the franchisor] to provide information to verify that it has not breached the [agreement], with the Plaintiffs themselves defining what is or is not a breach of the [agreement].

[61] Here, the motion judge effectively found that Pet Valu had breached s. 3 of the *AWA* by failing to disclose information necessary for the appellants to verify whether or not Pet Valu had breached a representation under the franchise agreement that Pet Valu received "significant volume discounts". It is akin to the pre-litigation oriented duty of disclosure rejected in *Spina.*

[62] Nor would I characterize a failure to include all material facts in a disclosure document as unfair dealing in the "performance" of a franchise agreement. A "material fact" is defined in s. 1(1) of the *AWA* as follows:

> "material fact" includes any information about the business, operations, capital or control of the franchisor or franchisor's associate, or about the franchise system, that would reasonably be expected to have a significant effect on the value or price of the franchise to be granted or the decision to acquire the franchise. [Emphasis added.]

[63] The franchisor is required to provide a disclosure document *before* the prospective franchisee signs the franchise agreement and to disclose any

material change: *AWA*, s. 5. Moreover, ss. 6 and 7 of the *AWA* provide specific remedies for the franchisor's failure to comply with s. 5.

[64] I turn now to the disposition in this case.

VI DISPOSITION AND COSTS

[65] As I indicated at the outset of these reasons, I would dismiss the plaintiff's cross-appeal and allow Pet Valu's appeal. I would also find in favour of Pet Valu on common issues 6(i), (iii) and (iv). There is therefore no need to answer common issue 7, which asks what, if any, damages Pet Valu is required to pay if it breached the duties which are the subject of common issue 6. In the result, I would dismiss the plaintiff's action against Pet Valu.

[66] The motion judge indicated in the January Reasons that, but for his suggestion that the plaintiff move to amend its pleadings and add an 8th common issue (or, in other words, if he had considered common issue 6 as it was originally worded), Pet Valu was in a position to obtain complete summary judgment. In the October Reasons, at paras. 33-36, he indicated that, if s. 3 of the *AWA* could be used to compel ongoing disclosure, it could only be used to compel disclosure of material information. In the context of his finding that Pet Valu franchisees benefited from materially lower product pricing, he characterized information such as whether Pet Valu received Volume Rebates and the amount of those rebates as "arguably non-material".

[67] In the circumstances, it is unnecessary to return common issues 6(i), (iii) and (iv) to the motion judge for determination. As will be apparent from my comments above in relation to s. 3 of the *AWA*, I agree with the motion judge's initial view, based on the common issues as originally framed, that Pet Valu did not have a duty under s. 3 to disclose whether it received Volume Rebates, the amount of Volume Rebates it received or the amount that it shared with franchisees. Section 3 imposes a duty of fair dealing on the franchisor in the "performance and enforcement" of the franchise agreement. If, post-*Bhasin*, non-disclosure can breach s. 3, it did not do so in this case. The disclosure at issue was not withheld in bad faith in connection with Pet Valu's performance or enforcement of the franchise agreement.

[68] I would award Pet Valu its costs of the appeal and cross-appeal, fixed in the amount of $25,000, inclusive of disbursements and HST. Counsel advised that costs below have not yet been fixed. They should be fixed by the motion judge, having regard to these reasons.

Released: "AH" "JAN 14 2016"

"Alexandra Hoy A.C.J.O."
"I agree J. MacFarland J.A."
"I agree P. Lauwers J.A."

SCHEDULE A

Certified 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 "A.W.A.") 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 A.W.A. 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?