Citation:	677815 B.C. Ltd. v. Mega Wraps B.C. Restaurants Inc. et al 2005 BCSC 503	Date: Docket: Registry:	20050217 S043517 Vancouver

IN THE SUPREME COURT OF BRITISH COLUMBIA

Oral Reasons for Judgment
The Honourable Mr. Justice Pitfield
February 17, 2005

BETWEEN:

677815 B.C. LTD.

PLAINTIFF

AND:

MEGA WRAPS B.C. RESTAURANTS INC. and MEGA WRAPS B.C. INC.

DEFENDANTS

AND:

WILLIAM JUBRAN

DEFENDANT BY COUNTERCLAIM

Counsel for the Plaintiff: H.S. MacDonald

Appearing for the Defendants: A. Pouladi

[1] THE COURT: This action brought on for trial under Rule 18A is concerned with the lawfulness of the termination of a franchise agreement and sub-lease, and whether in the event the termination was lawful the Court should exercise the discretion conferred by s. 24 of the *Law and Equity Act* to provide relief from forfeiture of the franchise agreement and the sub-lease.

[2] Mega Wraps Holdings Inc. is in the business of operating, licensing, and franchising distinctive turn-key wrap style restaurants throughout Canada. Mega Wraps B.C. Inc. was granted an area franchise which permitted it to license or franchise retail outlets in the Province of British Columbia.

[3] 677815 B.C. Ltd. entered into two agreements for the purchase of outlets: one of which is described as the Gorge Road outlet; the other which was described as The Bay Centre outlet, both situated in Victoria, British Columbia.

[4] As I appreciate the evidence, and I may be wrong in this regard, but this specific point is not material, an agreement was first concluded with respect to the Gorge Road site. At the request of Mega Wraps B.C., 677815 was subsequently persuaded to proceed first with the opening of The Bay Centre outlet in Victoria.

[5] The parties signed an agreement of purchase and sale in relation to The Bay Centre site on November 24, 2003. The purchase price stipulated in the agreement was $189,789, of which a payment of $45,000 was to be made at the outset, with the balance due on closing. The evidence establishes that 677815 and its principals anticipated that there might be some difficulty in obtaining financing in respect of the acquisition of the Gorge Road and The Bay sites. In that regard, it was looking for small business start-up financing, as I recall the evidence, from BMO Financial. As a result of its concern, the plaintiff, 677815, insisted upon the inclusion of Clause 20 in the purchase and sale agreement. That clause provides as follows:

> The parties agree that the closing of this agreement of purchase and sale is conditional upon the purchaser obtaining a small business development loan or other institutional financing (SBL financing) for an amount from a bank or other financial institution. If the purchaser is unable to obtain the SBL financing referred to herein, the purchaser shall be entitled at its option to terminate this agreement, and all or any monies paid by the purchaser to the vendor pursuant to this agreement as at date of such termination shall be

> returned to the purchaser without interest or deduction, save and except for an amount of $1,000 to cover the vendor's costs of the preparation of the documentation herein. The purchaser covenants and agrees to use all commercially reasonable efforts to diligently apply for, process, and obtain the financing referred to herein. This condition has been inserted for the sole benefit of the purchaser, and may be waived by the purchaser at any time.

[6] There is a residual piece of paragraph 20 but I need not be concerned with it.

[7] In fact, as had been anticipated by 677815, difficulty was encountered with respect to the financing. The evidence persuades me that the difficulty arose because of a cap placed upon such financing in the amount of $250,000. The borrowing requirements on the part of 677815 in respect of the two outlets with which we are concerned exceeded $250,000 such that the financing which was anticipated and which was required to accommodate the closing was not available.

[8] It appears from the evidence, including examinations for discovery, that Mr. Pouladi, an officer of Mega Wraps B.C. Inc., was aware of the terms and restrictions on small business development financing. The evidence also establishes that the principals of 677815 were not aware at the time the agreement of purchase and sale was signed of the restriction that would be imposed upon them. The information possessed by Mr. Pouladi was not imparted to principals of 677815 at the time the purchase and sale agreement was negotiated.

[9] The result was that the financing which had been anticipated was not made available so that when 677815 took possession of The Bay Centre site in December 2003, it was unable to complete or make payment of the purchase price balance which should then have been due. As I have noted, and as should be apparent from the text of section 20 of the agreement, it was open to the plaintiff to terminate the agreement of purchase and sale, and to obtain refund of all amounts paid by it, with the exception of the $1,000 administration

cost referred to in the clause. The plaintiff did not exercise that option. It was permitted to continue in possession of the property at The Bay Centre site, the understanding between the parties being that efforts would continue with respect to the procurement of financing, and forthwith upon it being obtained, the balance of the purchase price would be due and paid.

[10] Further discussions ensued between the parties through December, January and on into February 2004. On or about February 27, 2004, 677815 made payment of $84,789 on account of the outstanding balance to Mega Wraps B.C. Inc. and procured from Mega Wraps a letter of the same date dealing with the payment of the remainder of $60,000. The letter which was obtained and provided is material in the context of the dispute as I have described it. Its text provides as follows:

> Re sale of Mega Wraps store located at 413 1150 Douglas Street Victoria.
> Dear William Jubran,
> You are hereby authorized and directed to hold the amount of $60,000 of the final franchise payment of $144,789 owing in respect of the outstanding sale price balance of Mega Wraps store located at 413, 1150 Douglas Street, Victoria until the following items are completed:
>
> a) $10,000 compensation for delay
> b) $5,000 prepaid lease deposit
> c) the construction list attached
> d) insurance binder
>
> The franchisor will direct you for payment when all items are completed. This shall be your good and sufficient authority for so doing.

[11] The letter is signed by Mega Wraps. It is accompanied by a deficiency list described as “List for Bay Centre, February 16, 2004”, which identifies 14 items in respect of which the parties acknowledged or recognized construction deficiencies.

[12] The agreement or the letter is notable in a number of respects, not the least of which are the following. The meaning of the $10,000 compensation for delay payment and

whether that is a credit against $60,000 or otherwise is unclear. The reference to the $5,000 prepaid lease deposit, and that which was to be done in respect of it is unclear. There was no mechanism provided for the determination of answers on the question of whether construction deficiencies had been rectified. There is a dispute about the nature and circumstances in which the phrase “insurance binder” was inserted into the agreement. I need only say that nothing turns in this case on the question of whether or not an insurance binder was to be obtained. The position of the parties is that whatever was required in respect of insurance was in fact done.

[13] The parties proceeded through March, April and May 2004. At one time or another Mega Wraps B.C. asserted that deficiencies had been corrected. 677815 said they had not been rectified.

[14] On June 11, 2004, 677815 paid the sum of $22,841.75, which it acknowledged to be an amount undisputedly due on account of the purchase price. The result was that the remainder of some $21,000 was unpaid. The basis upon which payment was withheld resulted from the plaintiff’s reliance on the letter of February 27, 2004 and its claim that the construction deficiencies had not been cured.

[15] On June 15, 2004, Mega Wraps B.C. Inc. prepared three documents. The first was a notice to quit and give up vacant possession of the premises which had been leased by it under the terms of the sub-lease for the purposes of operating The Bay Centre site. The second was a document of the same date described as a notice of termination of the sub-lease. The third was a document described as a notice of termination of the franchise agreement. The franchise agreement was of course that under which 677815 agreed to operate the business, which it had acquired under the agreement for purchase and sale in November 2003. The sub-lease was the lease of the premises in respect of which the head

lessor was Cadillac Fairview, the head lessee was Mega Wraps B.C. Restaurants Inc., and the sub-lessee was 677815. The three documents dated June 15, 2004 were delivered to the plaintiff on June 17, 2004.

[16] The bases advanced for the termination of the franchise agreement were two in number. First, the franchisor, Mega Wraps B.C. Inc., alleged that the franchisee, 677815, had failed to pay the amount required on account of the purchase price. Secondly, the allegation was that the franchisee had failed to pay rent of $3,354.84 for the period January 11, 2004 through January 31, 2004. Reference was made to the fact that the omission to pay rent was to be regarded as an event of default under the franchise agreement itself. In that regard, I would agree that it appears the performance of the covenants in the franchise agreement and the sub-lease agreement were linked such that one might describe their relationship as one of cross default.

[17] The notice of termination of lease was based on the claim that rent of $3,354.84 had not been paid, that amount being computed for the period I have described, and on the further claim that the plaintiff had refused to provide or sign the form of consent to sub-lease required by Cadillac Fairview Corporation Limited, the head lessor.

[18] The franchisor indicated in the notice of termination of sub-lease that it intended to, and indeed did, reserve to itself the right to proceed at law against the sub-tenant for arrears of minimum basic rent. It subsequently took steps to initiate a distress or distraint proceeding in an attempt to recover that rent.

[19] On or soon after June 17, 2004, Mega Wraps B.C. Inc. entered into possession of the property and began its operation. This action was commenced by the plaintiff. Application was made to the court for an injunction which would restrain the manner in which Mega Wraps B.C. Inc. might deal with the property and the business. The application

for an injunction was granted and has been continued by consent through to the hearing of this action. The effect of the injunction was that Mega Wraps B.C. Inc. was restrained from or enjoined from selling or disposing of the business in any manner whatsoever.

[20] The action brought by 677815 is directed towards the determination of the lawfulness of the forfeiture and termination of the sub-lease, the obtaining of a writ of possession, relief from forfeiture, if necessary, and following the determination of legal rights in the course of this hearing, the assessment of damages in the event that such damages are appropriate.

[21] I will deal firstly with the question of rent and the termination of the sub-lease. The evidence establishes, and the defendant admits in any event, that rent had been paid in full for the period form January 11 to January 31, 2004. It follows that the notice of termination, premised as it was on an omission to pay rent for that period, cannot withstand scrutiny.

[22] The evidence establishes, and I find as a fact, that Cadillac Fairview asked Mega Wraps B.C. Restaurants Inc. to provide a consent to the sub-lease. Mega Wraps B.C. asked the plaintiff to sign a consent, but Mega Wraps B.C. failed to provide any copy of the form of consent to the plaintiff at any date prior to June 18, 2004. The sub-lease makes no reference to any obligation on the part of 677815 to sign a consent to lease. Indeed the sub-lease makes reference to the fact that, contrary to the evidence, Cadillac Fairview had consented to the sub-lease. There is a requirement in the head-lease that the head-tenant, namely Mega Wraps B.C. Restaurants Inc., obtain the consent of Cadillac Fairview to the sub-lease. That requirement is the obligation of Mega Wraps B.C. Restaurants Inc. and not the obligation of the plaintiff, 677185. Needless to say, if the consent is to be procured, it is likely that the sub-lessee is going to have to be involved in the leasing process in a manner which is acceptable to Cadillac Fairview, and in that regard reasonable covenants may be required. Cadillac Fairview is obliged to act reasonably in respect of the consent it procures.

In order for anyone to assess the reasonableness of the consent, it only makes sense that when asked, the head-lessee should have provided the form of consent to the sub-lessee. It did not.

[23] I find as a fact that 677815 did not refuse to sign any consent to sub-lease on or before June 17, 2004 so as to constitute or give rise to a default under either the sub-lease or the franchise agreement. I find as a fact that neither of the events alleged in the notice of termination of the sub-lease constituted an event of default which would in any way whatsoever justify the termination of the lease.

[24] I note that subsequent to the preparation and delivery of the initial notices and after learning that in fact rent for the period January 11 through January 31 had been paid in full, Mega Wraps attempted to shift gears and to claim that $5,889.30 was owing in respect of the period December 11, 2003 through January 10, 2004. The calculation or derivation of the sum of $5,889.30 has not been explained in the course of the evidence. The closest that one can come is to relate it in some way to the suggestion that an accounting is due in respect of the $5,000 sum referred to in the letter of February 27, 2004 on account of prepaid rent. I need only say that insofar as notices of forfeiture are concerned, the notices must clearly set forth the basis upon which the right to obtain forfeiture or benefit therefrom is alleged. It is not open to one who seeks forfeiture to move the goal posts by reference to subsequent or other events of default not specified in the notice of forfeiture.

[25] The final point that I should make in relation to the sub-lease is that as I have previously stated, Mega Wraps B.C. endeavoured to reserve unto itself the right to distrain for rent. The assertion of a right of forfeiture coupled with a continuing right to distrain raises an ambiguity which the courts have been prepared to construe as having the effect of nullifying the right of forfeiture. In other words, the preservation of the right to distrain has

been construed by the court as being inimical to, or hostile to, and opposite to, any claim of right and entitlement to forfeiture. In that regard I refer to a *Dubian v. Beechwood Promenade Inc***.** (1992), 22 R.P.R. (2nd) 88; *Regau and Downer* (1935), O.R. 397, *Meg Metals Inc. v. 1243611 Ontario Limited* (2000), 34 R.P.R. (3rd) 260, and *Baywest Properties Limited v. Stratheden Properties Limited*, [1992] B.C.J. No. 2573 (B.C.C.A.).

[26] For all of the reasons that I have stated, I am satisfied that the notice of termination of sub-lease cannot succeed, and indeed was unlawful and unenforceable except to the extent that it derives any validity from the fact that it is tied by way of cross-default to the franchise agreement.

[27] I then turn to the question of whether the termination of the franchise agreement is or was lawful. The conclusion which I have reached is that the plaintiff is not in default on account of payment of any part of the purchase price because the construction deficiencies which were identified in the correspondence of February 27, 2004 have not been rectified. The fact of non-rectification is pleaded. The fact of non-rectification is deposed to by Mr. Jubran on behalf of 677815. The defendant, and an officer on its behalf on examination for discovery, admitted that at least some of the items requiring correction had not been corrected at the date of discovery, which was a date following that of purported forfeiture. Until such time as the construction deficiencies were corrected, the amount that was the residual amount due on account of the purchase price was not payable. In that regard, the letter of February 27, 2004 is either an amendment which is binding upon the parties or, alternatively, it is a representation made by the franchisor on which the franchisee was intended to, and indeed did rely, such that it does not lie in the mouth of Mega Wraps to say that 677815 is in default in respect of any obligation to make payment on account of the purchase price. Mr. Pouladi, on behalf of the defendant Mega Wraps B.C., made reference to the fact that the agreement of purchase and sale is described to be the entire agreement.

Mr. Pouladi did an admirable job in representing the company in stating its position, but I record for the record that while the clause is contained in the agreement that this constitutes the entire agreement, nothing prohibits an amendment by agreement between the parties, and indeed that is what the letter of February 27, 2004 was intended to and did effect.

[28] In the event that there should be any doubt about the matter, the consideration for that agreement was the plaintiff's waiver, if you like, of its right to claim refund of all amounts that it had paid as provided by Section 20 to the agreement. I would conclude that by virtue of the discussions and the correspondence exchanged between the parties in February 2004, the plaintiff did in fact waive its right to rescind the agreement and became bound to complete the purchase on the terms specified in the purchase and sale agreement as amended by the letter of February 27, 2004. That is where we stand at this point in time. Should I be in error in that regard, I have said that the letter of February 27, 2004, the text of which I have read, can only be construed as a representation made by Mega Wraps B.C. to the plaintiff, a representation on which the plaintiff was invited to act, and a representation on which the plaintiff did act, whether or not to its detriment. It follows that the effect of the letter and the invitation contained therein cannot be countermanded by unilateral action of Mega Wraps B.C. The result is that there is no default under the franchise agreement in respect of which any right of forfeiture could or did accrue.

[29] There are other grounds raised by 677815 on which it supports the claim that the notice of forfeiture of the franchise agreement was of no force and effect. The first is that there was no approval of the termination obtained by Mega Wraps B.C. from Mega Wraps Holdings Inc., the head-franchisor if you like, as contemplated by the head-franchise agreement. I would not be prepared to conclude that the omission on the part of Mega Wraps B.C. to obtain that permission or approval nullified the termination. Rather, the omission of Mega Wraps B.C. to do so may give rise to a cause of action and remedy as

between Mega Wraps Holdings and Mega Wraps B.C. I would not be prepared to conclude that the omission to obtain the approval of the head-franchisor in any way affected the notice of forfeiture were it otherwise to have been found to be valid. At the same time, I must note that section 16.15 of the franchise agreement concluded between the plaintiff, Mega Wraps Holdings Inc., and Mega Wraps B.C. Inc., provides that the franchisors are to act reasonably and to be of fair and good faith of the parties. In that regard, I quote the following at s. 16.15:

> Where any provision of this agreement permits or requires the head franchisor and/or the franchisor to do any act or not to do any act on the basis of its discretion, opinion, or judgment, then unless this agreement specifically provides that the head franchisor and/or the franchisor shall be entitled to act in a sole and/or absolute discretion, or unless the agreement specifically provides that the head franchisor and/or the franchisor may act in an unreasonable or discriminatory manner, then the head franchisor and the franchisor both covenant to act reasonably and deal fairly and in good faith with the franchisee in deciding to do or not to do any such act. But having regard at all material times to what is in the best interests of the Mega Wraps franchise chain as a whole.

[30] The evidence surrounding the conduct of Mega Wraps B.C. in omitting to obtain the approval of the head-franchisor, in unilaterally attempting to revoke the effect of the representation and indeed amendment to the agreement which it permitted and to which it acceded on February 27, 2004, its unjustified claim of rent due in respect of a period from January 11 to January 31, 2004, and its subsequent attempt to claim rent in respect of a period for which no rent was in fact payable amount to unreasonable conduct, unfair conduct and dealing which cannot be described as good faith dealing with the plaintiff. In that respect, the omissions to which I have made reference are material, particularly so in relation to the assessment of damages which will proceed at a later date. However, the conduct does not, as I appreciate it, give rise to an independent ground on which to find that the notice of forfeiture was unlawful. Indeed, any such finding in that regard is not required as the notice was unlawful for reasons which I have previously described.

[31] The second matter with which the plaintiffs are concerned is that there is an Ontario court order which suggests that Mega Wraps B.C. may have been restrained or enjoined by virtue of the court proceedings in Ontario from attempting to terminate the franchise or the sub-lease. Quite frankly, I am not prepared to become engaged in or embroiled in an attempt to understand the nature of the legal proceedings between Mega Wraps B.C. and Mega Wraps Holdings in the Province of Ontario. Without full appreciation of the nature of that litigation, it would be unreasonable and indeed unwise for me as a judge of this court to attempt to construe that which was intended by the order of the Superior Court of Justice in the Province of Ontario. I therefore decline to place any emphasis, and indeed have placed no emphasis on the court order in the determination which I have reached.

[32] It should be apparent therefore that I have concluded that the notice of forfeiture of the franchise is of no force and effect. The notice of forfeiture or termination of the sub-lease is of no force and effect and consequently the notice to quit and deliver up vacant possession is of no force and effect.

[33] Had I concluded to the contrary so as to find either the notice of forfeiture of sub-lease or the notice of forfeiture of franchise to have lawful effect, I would have exercised the discretion conferred on me by s. 24 of the *Law and Equity Act* to provide relief from forfeiture. Strictly speaking for the reasons I have described, it is not necessary for me to describe why I would have done so, but in the event that others might disagree with my conclusions with respect to lawful effect, I will set forth the basis upon which that discretion would have been exercised in favour of the plaintiff.

[34] First of all, the subject matter of this dispute is purely monetary and when placed on the monetary scale, the economic imbalance between the completing interests is abundantly clear. The plaintiff has committed to spend approximately $190,000 to acquire the

franchise. The amount owing is well less than $21,000, and the actual amount remaining owing will depend upon who does what in respect of construction deficiencies. The circumstances are such that where nothing is alleged in relation to the conduct of the business, nor any impropriety in respect thereof on the part of the plaintiff, 677815, such that the dispute is solely economic, rectification or appropriate adjustment can be achieved through forfeiture on terms, and indeed would have been achieved on forfeiture through the relief from forfeiture on terms had that been necessary. To do otherwise would result in an unreasonable and unacceptable result.

[35] Had I been required to provide relief from forfeiture, I would have done so on terms. The terms would have been these. Prior to retaking possession of the property the plaintiff would be obliged to sign the consent in the form required by Cadillac Fairview as it pertains to the sub-lessee's obligations. The plaintiff would be obliged to pay all such rent arrears as might be determined should the defendant refer the question of rent arrears to a registrar of this court. As I say, I cannot see that such reference would be required as there is nothing to suggest that any rent is now payable. The question of whether or not there is an adjustment to be made in respect of the $5,000 prepaid lease payment should not require anything in the nature of a reference to a registrar.

[36] I would also have required that the sum of $22,158.25, representing the unpaid balance of the purchase price at this point in time be paid forthwith to Richards, Buell, Sutton to be held in trust on account of the final balance due and payable when all construction deficiencies were cured. I would have specified that the construction deficiencies were to be resolved within 30 days of today's date by mutual agreement, or in the absence of agreement between the parties as to their removal, then by arbitration pursuant to the provisions of the *Commercial Arbitration Act* of the Province of British Columbia. As I say, it is not necessary for me to deal with any of those terms or to

incorporate them in an order for the reason that I have not found a relief from forfeiture to be necessary as the original forfeiture was itself invalid.

[37] It follows that the orders that I am prepared to make today are these. The plaintiff is entitled to a declaration that the terminations by the defendant of the franchise agreement for the business and the sub-lease for The Bay Centre premises are invalid and of no force and effect. The plaintiff is entitled to a declaration that the business located at The Bay Centre premises is the property of the plaintiff, and is entitled to an order for delivery up by the defendants to the plaintiffs of that business. The plaintiff is entitled to a writ of possession which will be effective 21 days from today's date. The deferred period is required to permit the re-assembly of staff or, alternatively, the transfer of present staff to the plaintiff in order that the business operations may proceed uninterrupted.

[38] The defendant, Mega Wraps B.C. Restaurants Inc., which is in fact the lessee of the property, the head-lessee of the property, and Mega Wraps B.C. Inc., the franchisor, will each be enjoined from selling or otherwise dealing with the business or any portion of the undertaking in relation thereto, or from discontinuing the operation of the business or any portion thereof pending delivery of possession of the business to 677815 not later than 21 days from today's date.

[39] I am not prepared to provide any order with respect to construction deficiencies or rent. I described what I would have done in the event of relief from forfeiture. Perhaps with fine tuning and modification, those guidelines might be of assistance to the parties. It is not for the court to try to read into the agreement they reached of February 27, 2004 the manner in which disputes with respect to the completion of construction deficiencies are required.

[40] I am not prepared to make any final determination that no amount is due in respect of prepaid rent or other amounts of rent as the obligations in that regard may depend upon

whether or not accountings have been made by Cadillac Fairview in respect of year-end adjustments or calendar year adjustments.

[41] The plaintiff shall have its costs of this proceeding and shall be entitled to proceed at a date of its choice with a hearing of the balance of the relief claimed, namely the procurement of an order that the plaintiff recover from the defendants general special and punitive damages to be assessed for breach of contract, detention, trespass, and unlawful distress.

(DISCUSSION)

[42] THE COURT: All I am prepared to do in that regard is to provide that you shall send a draft of the order to Mr. Pouladi at a fax or email address that he shall provide to you and state presently on the record. If he does not reply within 48 hours of delivery, then you will be permitted to enter the order without his approval as to form.

(DISCUSSION)

[43] THE COURT: the injunction that I granted continues until such time as possession is delivered up. It strikes me that it is in the interests of all parties to make this a peaceful transition.

(DISCUSSION)

[44] THE COURT: The only order I would be prepared to make is an order under Rule 44 which talks about the preservation of the computer, the hard disk and all of the material therein that pertains to the operation of this business site. I do not know what else is on the computer, whether it is being used for purposes other than the operation of the business, but I will provide that the computer and all of the information, electronic, magnetic, or digital,

or any other form pertaining to the operation of the business be preserved by the defendant, Mega Wraps B.C. and Mega Wraps B.C. Restaurants Inc. pending delivery of the property to the plaintiff.

"I.H. Pitfield, J."
The Honourable Mr. Justice I.H. Pitfield