

**SUPREME COURT OF NOVA SCOTIA**

**Citation:** *Groupe Restaurants Imvescor Inc. v. Zliv Creations Inc.*, 2017 NSSC 31

**Date:** 20170206

**Docket:** Hfx No. 456347

**Registry:** Halifax

**Between:**

Groupe Restaurants Imvescor Inc./Imvescor Restaurant Group Inc.

Plaintiff

v.

Zliv Creations Inc., a body corporate, Neil Myers, Greg Ross, and Alumni Bros  
Inc., a body corporate

Defendants

**Judge:** The Honourable Justice Jamie Campbell

**Heard:** January 25 and 26, 2017, in Halifax, Nova Scotia

**Counsel:** Ian Dunbar and Stephen MacLean for the plaintiff  
Kelly Shannon and Simon Lake for the defendants, Zliv Creations Inc.  
and Neil Myers  
Brian Casey for the defendants, Alumni Bros Inc. and Greg Ross

## **Introduction**

[1] Groupe Restaurants Imvescor Inc./Imvescor Restaurant Group Inc. (“IRG”) is the franchisor of Pizza Delight restaurants and is seeking an interlocutory injunction against Neil Myers, Greg Ross and their related companies. Neil Myers is the franchisee of the Antigonish Pizza Delight. IRG says that Mr. Myers breached his franchise agreement with them by directly involving himself in the ownership of a competing Pannizza franchise that was to open 20 metres away from his own Pizza Delight restaurant. IRG wants to prevent Neil Myers from continuing to breach the franchise agreement by having any involvement with the Pannizza franchise or the company that owns it.

[2] Greg Ross is now the only shareholder of the company that owns the Pannizza franchise. IRG wants to prevent Mr. Ross or his company from opening the Pannizza restaurant until the claims it has made against Mr. Myers, Mr. Ross and their companies have been finally resolved in court.

## **Summary**

[3] The motion for an injunction against Neil Myers and his company Zliv Creations Inc. is granted. The motion for an injunction against Greg Ross and Alumni Bros Inc. is not granted.

[4] Neil Myers does not dispute that an injunction should be in place preventing him from having any involvement with Pannizza and from otherwise acting in breach of his franchise agreement with IRG. He disputes some of the allegations against him but acknowledges that he should not have any involvement whatsoever with Pannizza.

[5] The dispute on the injunction is between IRG and Greg Ross. Mr. Ross wants to open the Pannizza franchise. Neither he nor his company, Alumni Bros have ever had a contractual relationship with IRG and they have not agreed to any non-competition provisions. IRG argues that because Neil Myers was once directly involved as shareholder and President of Alumni Bros, which now owns the Pannizza franchise, that company should not be able to operate the franchise and neither should Greg Ross himself. They should be bound by the non-competition provisions in Neil Myers’ franchise agreement with IRG. IRG argues that Greg Ross knew or should have known about the non-competition provisions in Neil Myers’ franchise agreement with IRG and that the company is essentially a proxy

for Neil Myers. Mr. Myers should not be able to circumvent the non-competition clause by doing through another company what he could not legally do himself.

[6] Based on the evidence on the motion there is a very strong case that Neil Myers breached the terms of his agreement with IRG. The case against Greg Ross and Alumni Bros will not be so easily made out. Finding Greg Ross and his company to be proxies for Neil Myers would involve a finding that Mr. Ross was a participant in an arrangement to circumvent the provisions of Mr. Myers' franchise agreement so that the company was set up for that purpose. Greg Ross' motive appears to have been to set-up a pizza franchise, not to provide cover for Neil Myers in a scheme to breach his contract with IRG.

[7] IRG is seeking to enforce a covenant in restraint of trade against Greg Ross and Alumni Bros. It would have to show that it has a *prima facie* case against them. It has not met that burden. Even if the non-competition provision in Mr. Myers' franchise agreement that IRG seeks to enforce against Mr. Ross and Alumni Bros is not a covenant in restraint of trade, the strength of its case against them is relevant in considering the balance of convenience.

[8] If an injunction is not granted the damages that IRG will suffer will be the loss of royalty payments from the Pizza Delight franchise in Antigonish. Those payments have been between \$2,500 and \$4,000 each month, based on the sales at that location. There is no evidence that there would be a loss of good will or business reputation to IRG itself. The financial loss arising from the opening of another business can be assessed.

[9] People who breach non-competition provisions should not be able to flout them pending trial. Here, it is significant that Neil Myers will be subject to an injunction preventing him from having any involvement in the competing franchise. IRG has already obtained a not insignificant remedy.

[10] The balance of convenience involves aspects related to the strength of the case and the nature of the damages that would be suffered by IRG. The three parts of the test for granting injunctive relief are not watertight compartments.

[11] If Greg Ross is not able to open his Pannizza franchise he will likely be ruined financially. His life savings have been invested in the business and he has borrowed money to set it up. It would be unlikely that the matter would ever make it to trial if he must keep the operation suspended for some time. That may be the situation in many cases where a smaller business is subject to contractual restraints

on competition in favour of a larger one. It is relevant however that the granting of an injunction, while not logically or necessarily dispositive of the case, could reasonably be anticipated to dispose of the case.

[12] That is of more concern when the case to be made by IRG will involve legal and evidentiary challenges. That determination can be made without a detailed assessment of the evidence and can be based on the evidence on the motion. IRG will have to show that Mr. Ross allowed himself and Alumni Bros to be used by Mr. Myers to circumvent the non-competition provision in his franchise agreement so that he could, for some reason, compete against his own restaurant.

[13] Not granting the injunction would likely not have the effect of practically determining the case. The opening of the Pannizza restaurant will not put the survival of IRG or the Pizza Delight brand at risk and probably will not put at risk the survival of Neil Myers' own Pizza Delight franchise. If that franchise does lose money to the competing Pannizza the loss will not threaten its survival and will not diminish its good will, reputation and value to IRG should it claim to take over the franchise from Neil Myers. It is a loss of income over time.

[14] It would not be equitable to issue an injunction that has the real potential to decide the case against the defendant in practical terms, based on limited evidence on a motion, in a matter that would be highly contestable at trial, and where the potential damage to the plaintiff is not to business reputation or goodwill but to market share.

### **Interlocutory Injunction**

[15] The merits of IRG's claims against Mr. Myers and Mr. Ross will eventually be decided after a trial in which all the evidence is heard and assessed. The issue at this stage is whether the injunction should be granted pending that trial. That injunction would prevent Mr. Myers from breaching his franchise agreement and prevent Mr. Ross from opening the Pannizza franchise.

[16] IRG has sued both Neil Myers and Greg Ross. In its Statement of Claim IRG says that Neil Myers breached his franchise agreement with IRG by engaging in a competing pizza business and that he conspired with Greg Ross to do that. It alleges that Neil Myers and Greg Ross, along with Mr. Myers' company and a company of which they were both at one time shareholders, engaged in a scheme to open a competing Pannizza restaurant in a way that intended to frustrate the contractual obligations that Mr. Myers and his company had to IRG.

[17] I granted an interim injunction on October 26, 2016 and it was made returnable on January 25, 2017. The interim injunction was essentially a stop gap measure and the motion now is for an injunction that will have a longer effect, until a final decision is made on the merits.

[18] Mr. Myers agrees that the injunction should continue in place with respect to him. He is a Pizza Delight franchisee and acknowledges that an injunction that prevents him from engaging in competition with Pizza Delight is consistent with the franchise agreement that he has signed. He says that he has removed himself from any involvement whatsoever that he may have had with Pannizza. Mr. Ross for his part, says that the continuing of an injunction would make him collateral damage in the fight between Pizza Delight and its franchisee. It would destroy his business and ruin him financially. He says that he had no obligations to Pizza Delight and was not aware of any obligations that Neil Myers might have had as a franchisee. He says that if the injunction remains in place he will be bankrupt before a trial takes place and in that event there will be no trial.

### **The Franchises**

[19] In May 2013 Neil Myers signed a franchise agreement with IRG as guarantor for his company Zliv Creations Inc., to take over the Pizza Delight franchise on Main Street in Antigonish. The agreement is for a period of ten years and grants Zliv Creations the right to use the Pizza Delight system, including its trademarks, business format, methods and operating system at that franchise. The agreement requires the franchisee to operate the franchise with due diligence and to devote his full time and attention to the establishment, development and operation of the franchise. The agreement also prohibits the franchisee from disclosing confidential information about the business affairs of either the franchisee or the franchisor, IRG.

[20] The franchise agreement also provides that the franchisee cannot be involved with any other restaurant during the term of the agreement and for two years after its expiry. The wording of that provision, at Article 14.1 is broad (plaintiff's motion brief, para. 72). The franchisee cannot in any manner whatsoever carry on or be engaged in or concerned with, "or interested in or advise", lend money or guarantee the debts or obligations in any business operating or franchising "a restaurant business of any kind, regardless of whether it is quick service (fast food), sit down, full service, take out, home delivery, or some combination thereof" that offers pizza or pasta. Legal agreements can be complex

documents and this one is not notable for its clarity of expression. Yet, to any reasonably literate reader it is abundantly clear that the franchisor, IRG, is very concerned that its franchisees not be involved in virtually any conceivable way with any other business that sells pizza or pasta. It isn't subtle about that.

[21] The Antigonish Pizza Delight franchise has been a successful venture. Its sales are up and it has been recognized as a successful business in the local community. No one seems to doubt that Mr. Myers has done well with it. There is no evidence to suggest why he would do anything to intentionally harm his own business against his own self interest. He says that he saw other Pizza Delight franchisees who had interests in other businesses. Some of them were involved with other restaurants that primarily offered pizza. IRG agrees. There are franchisees who operate those kinds of businesses but they have other forms of agreements with IRG and some are grandfathered from older forms of the franchise agreement. Neil Myers never had permission and never sought permission to be involved directly with a competitor.

[22] Pannizza is another franchised restaurant that sells pizzas, baked sandwiches, poutine and salad. Pizza Delight asserts that it is in direct competition with Pizza Delight. Some of the senior executives of Pannizza are former Pizza Delight employees and franchisees. Pannizza plans to open a franchise in Antigonish only about 20 metres away from the long-established Pizza Delight restaurant.

[23] IRG became suspicious that its franchisee Neil Myers was involved with the new Pannizza franchise. It's not hard to see why. There was a Facebook post that referred to Neil Myers putting up signs for Pannizza. Mr. Myers was aware of the opening of the new franchise but did not contact IRG to put in place what they refer to as a competitive entry plan to respond to the new restaurant opening nearby. Mr. Myers says he has never heard of such a thing.

[24] In September 2016 IRG became aware that Mr. Myers was "involved" in the Pannizza franchise. In mid-September 2016, Amber Coggan-Imbeault, Brand Leader for the Pizza Delight chain and an employee of IRG did an internet search for information about the Antigonish Pannizza opening. What she found would strike anyone as being at least very strange. On the Pannizza Instagram page there was a photograph that was posted on September 13, 2016. It showed Neil Myers, the Pizza Delight franchisee with three other individuals. The caption reads: "Franchise partners in training. Antigonish Nova Scotia and Oshawa Ontario here

we come” (Amber Coggan-Imbeault’s affidavit, tab N). In the picture Mr. Myers is smiling and gesturing while wearing a t-shirt emblazoned with a Pannizza logo.

[25] Mr. Myers was contacted by Isabelle Breton, the General Counsel and Secretary at IRG on September 26, 2016 advising that he had been in breach of the franchise agreement and demanding that he take steps to prevent the opening of the Pannizza in Antigonish. Mr. Myers responded to Ms. Breton by email on September 29, 2016. He said that he was not the franchisee of the Pannizza Antigonish location. Having received a rather stern letter from the franchisor setting out some rather serious allegations his response is curiously off the cuff (Amber Coggan-Imbeault’s affidavit, tab R).

Hi guys,

I received your demand letter.

I’ve been flat out organizing home coming weekend as we are the official headquarters, something I extensively lobbied for. Anyways, I am NOT the franchisee of the Pannizza opening in Antigonish.

I am getting ready to be inducted into the ST FX sports hall of fame tonight. Exciting.

I now consider this matter closed.

Regards,

Neil

[26] The email makes no reference to his actual involvement with the franchise. Ms. Breton responded the next day. She said that IRG was aware of his involvement with the Pannizza restaurant and asked him to disclose the exact nature of his involvement. Mr. Myers did not respond. This might have been a good time to “come clean” but Neil Myers says that he was angry at how IRG dealt with him by writing formal letters rather than making a call to him. He said that his response to the situation was perhaps the biggest mistake he has ever made. Even without knowing what other mistakes Mr. Myers has made over the course of his life, it is safe to say that the way that he responded to IRG likely ranks toward the higher end.

[27] Another letter was sent, this time from Ian Dunbar, local counsel for IRG. Mr. Myers responded saying that he did not have the “power or authority to stop this store from opening”. He referred to the Facebook post and the pictures and asked that he be given more information about the allegations. That sounds rather

disingenuous considering what had been happening behind the scenes and unknown to IRG.

[28] Mr. Myers says that in May 2016 he heard about rumours of a Pannizza opening in Antigonish. He says that he was concerned because on the surface it looked like competition. His friend of over 15 years, Greg Ross, told him that he was considering becoming a franchisee. Mr. Myers says that he saw that as a positive. He felt that he would be able to work with him to prevent competition with his Pizza Delight franchise.

[29] In July 2016 Greg Ross negotiated a franchise agreement with Pannizza. Neil Myers was not a party to that agreement. Greg Ross signed it himself.

[30] Neil Myers says that in or about August 2016 while “on vacation” he visited the Pannizza headquarters in Quebec. He was there with Greg Ross. Mr. Myers said that he was not there for training but did attend the training on one or two days. He insisted that he was just “investigating a business coming to my town”.

[31] There is no apparent reason why Pannizza would allow the franchisee of another restaurant to attend its training session to investigate it. It is odd that the Pizza Delight franchisee would be spending his vacation time visiting the headquarters of a company that was a competitor as defined by the terms of his franchise agreement. He obtained information about the business model and menu options. He said that it was “at that point” that he determined that Pannizza was not a competitor. He says that he believed it could “actually be beneficial” to his franchise because Pannizza would compete with the other late night fast food options that also happen to compete with Pizza Delight.

[32] Once again, he was not entitled to make that call. That might make sense on some level to someone who had not read the franchisee agreement with Pizza Delight. The document is unequivocal on the issue. A competitor is anyone who sells pizza or pasta whether it is casual dining, fast food or simply take home and delivery. Assisting Greg Ross was an obvious breach of the franchise agreement.

[33] Mr. Myers’ telephone records provide evidence to suggest that he was more than just an observer. He made phone calls to a contractor who worked for the Pannizza franchise. He also called Derek Massad, the CEO of Pannizza and a former employee of Pizza Delight.



[34] In August 2016, Greg Ross incorporated a company. Mr. Ross says that his friend Neil Myers was made shareholder only because he needed to have someone in Nova Scotia to receive documents and sign things on his behalf. There was never and intention that Neil Myers would have a beneficial interest in the company. Neil Myers resigned from the company on October 4, 2016 after receiving the communication from IRG. There was some delay in the transfer of shares but it was the intent that Neil Myers would be removed from involvement with the company.

[35] Oddly though, the company is called Alumni Bros. Neil Myers and Greg Ross knew each other from their time at St. FX. There are no other shareholders. Mr. Ross explained that the name did not refer to him and Neil Myers but referred to “all of my brothers including my own brother and my kids that are brothers.” That kind of explanation does nothing to enhance confidence in the reliability of Mr. Ross’ evidence.

[36] Mr. Myers was not merely a nominal shareholder. There was a shareholders agreement in place and Neil Myers was President of the company. Mr. Ross was the Vice President and Secretary. In September 2016 Alumni Bros entered the lease for the property on Main Street where the Pannizza franchise was to operate. Both Neil Myers and Greg Ross signed the lease on behalf of the company. If Neil Myers was involved only to facilitate the signing of documents there would be no reason for him to be President of the company and no reason for a shareholders agreement that gave him a substantial interest in the company. It makes no sense.

[37] It is also of interest to note that when Neil Myers was telling the IRG General Counsel that he was busily working on the St. FX homecoming plans for the restaurant there were negotiations going on with East Coast Credit Union about financing involving Neil Myers and Greg Ross together. Sandi Hayne, Commercial Officer for the Credit Union sent an email to Neil Myers. The subject line reads “re: Pannizza” and the note talks about moving forward on a letter of offer. During the email exchange between Neil Myers and Sandi Hayne it becomes evident that Neil Myers is heavily involved with Pannizza. On September 30, 2016 Sandi Hayne wrote to both Neil Myers and Greg Ross. “Attached is the letter of offer. The maximum we would be able to lend is \$120,000 on this franchise based on our policy.” Greg Ross responded:

Thank you for quick reply and handling of this for Neil & I.

As I'm sure you're aware, Neil is fully entrenched in Homecoming weekend. I will be discussing this with him over the next few days and we will get back to you early next week.

Thank you again and enjoy your weekend.

[38] This was while Neil Myers was saying he had nothing to do with Pannizza.

[39] In September of 2016 a private investigator retained by IRG noted that Neil Mr. Ross was present on several separate occasions at the Main Street property that was to become the Pannizza franchise location. Mr. Myers acknowledges that he was in the building on those days but asserts that what he was doing was not in conflict with his obligations under the franchise agreement with IRG. He says that he had been given keys to hold for Greg Ross who was living out of the province and he had agreed to assist him as a friend. On another occasion, he went to that location to work on personal business because it was quiet and he could work undisturbed. He showed a locksmith into the premises on one other occasion and showed a representative from Coca Cola into the location.

[40] Mark Gabrieau is the owner of a restaurant that is located between the Pizza Delight restaurant and the location leased for the Pannizza franchise. He says that in the fall of 2016 Mr. Myers told him that he was the owner of the new Pannizza restaurant. He says that Mr. Myers told him that he wanted to be an owner and not just a franchisee. He says that Mr. Myers never mentioned to him that anyone else was involved in the Pannizza franchise.

[41] At the very least there is evidence that would allow strong inferences to be made to support the legal conclusion that Neil Myers was in breach of his obligations under the franchise agreement with IRG. The Pannizza franchise is a competitor and Mr. Myers cannot use his own business sense to justify another interpretation.

[42] Becoming involved with Pannizza could be interpreted as an unsophisticated or naïve decision on the part of Neil Myers. His interpretation of the franchise agreement is a very long stretch. But there is no evidence to suggest why he would want to encourage competition against his own franchise and it is difficult to imagine that he would assume that his involvement with Pannizza would go unnoticed. He seems to have made no effort to keep it secret. He was operating in the open and telling people in a small town about his direct involvement in Pannizza. He was at the location, he was photographed at Pannizza headquarters, he told his business neighbour Mr. Gabrieau, and he told the Credit Union that he

was involved with Pannizza. That all suggests that his interpretation of the franchise agreement based on his observation of other Pizza Delight franchisees was that he could be involved with Pannizza.

[43] The demand letter from IRG changed that. He knew then that there was a problem. He said that he was angry about how IRG approached him. But his response was not forthright. He gave answers that were intended to keep Pizza Delight in the dark about what was going on. On October 6, 2016 Mr. Myers wrote to Mr. Dunbar in response to the request that he disclose his involvement with Pannizza.

You say that I am in breach of the Franchise Agreement. In the original letter there were 4 pages that included a snap shot of a text, an email, and a photo of building on a corner. All these items are time stamped and dated, yet another photo of the same store and what seems to be a statement form someone on Facebook, doesn't have any dates, when it was taken, where it was from, when this individual commented, etc. I would ask that you provide a proper printout of the specific document that you're relying on for these allegations. Furthermore, why you believe this alleged comment to be accurate.

[44] Mr. Myers in that note appears to be feigning ignorance of what Mr. Dunbar is talking about. He is essentially asking how anyone could think that he was involved with Pannizza. That was written on October 6, 2016. By that time he had gone to Pannizza headquarters in Quebec, spent some days at least observing franchisee training, been photographed and identified as a Pannizza franchisee, assisted in various ways with the physical set up of the Pannizza location, become President of Alumni Bros which leased the space used by that franchise, been heavily involved with the financing for the Pannizza franchise, and spoken with the CEO of Pannizza.

[45] Neil Myers was served with IRG's Notice of Action and Statement of Claim on the evening of October 12, 2016. His telephone records indicate that evening he spoke for 49 minutes with Dan Boyd the Area Developer for Pannizza and President of Pannizza Restaurants of Atlantic Canada Inc. He then called Greg Ross and once again called Mr. Boyd. He also called Derek Massad of Pannizza that evening. His reaction to the documents was to call Mr. Ross and the Pannizza representatives.

[46] There is substantial evidence that Neil Myers was involved in the start-up of the Pannizza franchise in Antigonish. The information that he provided to IRG in response to their inquiries was, at best, misleading. The accumulation of evidence

suggests that Neil Myers was not merely helping a friend with what he believed was to their mutual benefit. There is a strong inference that can be made based on the evidence put forward on the motion that he was actively engaged in the development and set-up of a business that would compete with IRG and Pizza Delight and that he was not forthright when inquiries were made about that.

[47] Greg Ross' situation is different. Neil Myers says that Greg Ross knew nothing about his agreement with Pizza Delight. He would not know the details of that agreement. Mr. Ross confirms that. Mr. Ross might have assumed that Neil Myer's franchise agreement, like his, would have some kind of non-competition provision. But, if Neil Myers had convinced himself that there were no limitations that would prevent him from being involved with Pannizza it is likely that if there were discussions on the issue, he would have convinced Greg Ross of the same thing. There is however no evidence of any discussions between Mr. Ross and Mr. Myers about any obligations that Mr. Myers may have had.

[48] Greg Ross had no contractual obligations and no connection at all to IRG. He just wanted to open a restaurant.

[49] As it stands now, Neil Myers has no personal involvement with the Pannizza franchise and is not a shareholder, officer, director of, or investor in Alumni Bros. Neil Myers is not an owner of the franchise and is not a party to the franchise agreement between Pannizza and Greg Ross.

[50] Greg Ross and his Pannizza franchise have had the benefit of the involvement of Neil Myers during the period of its initial set-up. Mr. Myers was involved with the physical set-up, the financing, the leasing of the premises, and in discussions with Pannizza. Neil Myers appears to have convinced himself either that his involvement was not a breach of his contractual obligations to IRG or that if it were a breach it might somehow go unnoticed. There is no evidence that Neil Myers shared information with Greg Ross that was confidential to IRG and that would have benefited Greg Ross or Pannizza.

### **The Application of the *RJR-MacDonald* Test**

[51] The law to be applied is the three-part test set out in *RJR-MacDonald Inc. v. Canada (Attorney General)*<sup>1</sup>. The first question is whether there is a serious issue to be tried. The second question is whether the party seeking the injunction will

---

<sup>1</sup>[1994] 1 S.C.R. 311.

suffer irreparable harm if the injunction is not granted. The final question is whether the balance of convenience favours the granting of the interlocutory injunction. That three-part test is easily enough stated but each part can involve some complications of its own.

[52] The first question generally restrains the judge on the motion from engaging in a full assessment of the case on its merits. Injunctions are assessed based on affidavit evidence during the hearing of a motion. The evidence is incomplete. The moving party is not required to put forward its case on the merits. The test of whether there is a serious case to be tried is usually easily met. It is often very briefly addressed because, as noted by the Supreme Court in *RJR-MacDonald* the threshold is a low one.

[53] In *RJR-MacDonald* the court recognized that there are some limitations on that restriction. Some exceptions arise. They are said to arise rarely but the kinds of cases that fall within them seem to be increasing. One is when the interlocutory motion will in effect amount to a final determination of the matter such as when the right which the applicant seeks to exercise can only be exercised immediately or not at all. An example of that would be an injunction to prevent an event from taking place at a scheduled time. Another exception is when “the result of the application will impose such hardship on one party as to remove any potential benefit from proceeding to trial.”<sup>2</sup> The enforcement of covenants in restraint of trade are examples of cases that fall within the scope of those exceptions.

[54] If the plaintiff can establish that the defendant was properly subject to contractual provisions limiting competition a *prima facie* case is often made out. Setting up a company to do what the defendant could not do personally, would not present a significant obstacle to achieving that level of proof.

[55] Even if the case does not fall directly within one of the two exceptions the balancing of convenience necessarily involves at least some consideration of the relative merits in some cases. If a plaintiff’s case rises above the standard of frivolous or vexatious yet is demonstrably less likely to succeed than the defendant’s case that is a factor that should be considered.

---

<sup>2</sup>*RJR-MacDonald*, para. 51.

[56] As Justice Robert Sharpe has noted in the text *Injunctions and Specific Performance*<sup>3</sup>;

It seems incontrovertible that the plaintiff's chance of ultimate success is directly relevant to an assessment of the relative risks of harm. The likelihood of the plaintiff's success or failure relates both to the extent of the risk that there will be any legal harm which calls for a remedy in favour of the plaintiff, and to the extent of the risk that an injunction may prevent the defendant from pursuing a rightful course of conduct. Surely all other considerations equal, a plaintiff who has a 75% chance of success has a stronger claim to interlocutory relief than a plaintiff who only has a 25% chance of success. As it is relevant, the strength of a case should be considered, unless there is some compelling reason to disregard it.<sup>4</sup>

[57] Justice Sharpe notes that the difficulty with assessing the strength of the case varies widely according to the circumstances of the case. Caution must be exercised in giving weight to a preliminary assessment on the merits. In some cases, where practically speaking, the rights of the parties are finally determined by the motion the strength of the case should be a predominant consideration. Granting or failing to grant injunction to enforce covenants in restraint of trade, or as here to prevent the defendant from engaging in a competitive business, can amount to a final disposition of the case.

[58] Whether this case falls within the exceptions, so that the plaintiff needs to show more than a serious case to be tried, or is a case in which the relative strength of each party's case is considered in weighing the balance of convenience, it is appropriate to consider the strength of the case on a preliminary basis, recognizing that it is only preliminary. The claims as set out in the Statement of Claim are that Greg Ross, Neil Myers and their companies participated and conspired together to open the Pannizza restaurant in a scheme that was intended and designed to avoid or frustrate Mr. Myers' contractual obligations to IRG under the franchise agreement. The torts of conspiracy, intentional interference with economic relations and inducing breach of contract are pleaded.

[59] The civil tort of conspiracy can be proven if the predominant purpose of the defendant's conduct is to cause injury to the plaintiff or if the conduct is unlawful, is directed toward the plaintiff and the defendant knows or should know that injury to the plaintiff is the likely result. Greg Ross says that his purpose was just to

---

<sup>3</sup>Canada Law Book, loose-leaf edition.

<sup>4</sup>Para. 2.160.

succeed as a Pannizza franchisee. The predominant purpose would have to have been injuring IRG and not making money himself. There is no evidence here of an intention to injure IRG. For there to have been a conspiracy, Mr. Myers and Mr. Ross would have to have planned together to harm IRG or Pizza Delight. Mr. Myers has several years left on his franchise agreement. Doing damage to his own restaurant location would seem very odd. It would amount to acting against his own interests.

[60] The other way in which the tort can be shown is through an unlawful act directed at the plaintiff. Once again, there is no evidence at this point to allow the inference to be made that Mr. Myers and Mr. Ross worked together to direct their actions at IRG and nothing to suggest that what Mr. Ross himself did was illegal.

[61] The second tort pleaded is intentional interference with economic interests. The tort involves an unlawful act against a third party intended to cause harm to the plaintiff. IRG has not pleaded that Mr. Ross has committed any unlawful act against any third party.

[62] IRG also asserts that Mr. Ross induced Mr. Myers to breach his contract with IRG. The tort occurs when a person has knowledge of the agreement and intends to bring about its breach. Mr. Ross says that he did not know about the non-competition provisions in Mr. Myers' franchise agreement with IRG. Mr. Myers it seems either had a rather peculiar interpretation of the non-competition clause or just willfully ignored it. There is however nothing to suggest that Mr. Ross knew about the terms of the contract and if he did know in general terms, whether he understood that what Mr. Myers was doing contrary to the terms of Mr. Myers' agreement.

[63] To make out the tort, it would have to be shown that Mr. Ross induced Mr. Myers to breach his contract with IRG. Again, it is not clear what benefit would accrue to Mr. Myers in breaching the franchise agreement and competing against his own restaurant. There is nothing at this point to allow the inference to be made that Mr. Ross offered anything to Mr. Myers to get his help.

[64] IRG argues that Mr. Ross and Alumni Bros should be found to be proxies for Neil Myers. A person cannot avoid the limitations imposed by a non-competition clause by incorporating a separate company or by having a third non-arms length party incorporate a company to do that. While the economic torts as pleaded would not amount to the enforcement of a restraint of trade, the

enforcement of the non-competition clause against Mr. Ross and Alumni Bros would be just that.

[65] Alumni Bros was incorporated on August 31, 2016 at a time when it appears Neil Myers had no sense that he was doing anything wrong. The purpose of the company was to run the Pannizza franchise. At this stage of the proceeding the evidence points more strongly toward the inference that the company was not set up to avoid the non-competition clause. It was incorporated to run the Pannizza franchise. It was only after it became evident that Neil Myers' involvement would run afoul of his franchise agreement with IRG that efforts were made directed toward concealment.

[66] If the focus is on the economic torts, the case does not involve the enforcement of a restraint of trade. The case with respect to those torts rises above the level of being frivolous and vexatious. The case is far from substantial or compelling. IRG is not required to prove its case on the merits to obtain an injunction but, at the same time it must be noted that its case against Greg Ross and Alumni Bros based on those torts, is far from being clearly likely to succeed.

[67] Once IRG seeks to impose on Greg Ross and Alumni Bros the restraint on trade found in the IRG franchise agreement with Neil Myers, it is seeking to enforce a restraint on trade requiring that a case be established at least close to being on a *prima facie* basis. The evidence does not allow for a strong inference to be made that Alumni Bros and Greg Ross were proxies or vehicles for Neil Myers to allow him to avoid his contractual obligations to IRG.

[68] The second issue is whether damages would be suffered by IRG and whether those damages would be irreparable. Irreparable damages refer to those for which there could be no adequate compensation or for which damages could not be recovered in a practical way from the other party. Permanent loss of market share and goodwill or business reputation are the kinds of damages that are specifically recognized in *RJR-MacDonald* as irreparable.

[69] It would be entirely legal for a Pannizza franchise to open two doors down from Neil Myers' Pizza Delight. There are several other restaurants of various kinds located close to that location. There is no evidence that the opening of a Pannizza franchise by Alumni Bros or Greg Ross would damage the goodwill or business reputation of IRG or Pizza Delight. The loss would be a loss of business. The limited market would have to be shared with yet another competitor. The evidence from IRG was that when a new restaurant comes into the market Pizza



Delight loses business for a few months then usually recovers that business. The loss to IRG would be the loss of royalties paid under the franchise agreement by Neil Myers from his business. That is a definable and calculable amount.

[70] There is no evidence to establish that Pannizza obtained an unfair advantage arising from the involvement of Neil Myers in the start-up of the new franchise. There is no evidence that relevant confidential business information was shared with Pannizza or that Neil Myers would even have access to confidential information that would not otherwise be available to Pannizza through its executives who themselves are former Pizza Delight employees or franchisees.

[71] A person bound by an enforceable non-competition provision should not be able to avoid injunctive relief by claiming that the loss to the franchisor is compensable by an award of damages. Where there is a *prima facie* case that the defendant is bound by that agreement other principles are at stake. The three parts of the test for an injunction relate to each other in some significant ways. Here, if the case involves the economic torts, the case needs only to be established to a low threshold level but the anticipated damages would be of a kind that could be compensated by an award of damages. If the case involves the enforcement of a restraint of trade, the irreparability of the harm should not stand in the way of the injunction but the case runs into problems with the higher standard of proof.

[72] The third stage of the test is the consideration of the balance of convenience. That involves the weighing of the downside risks for both parties. It also allows for a consideration of how the other two parts of the test relate to each other.

[73] Considering the balance of convenience involves some basic consideration of the merits of IRG's case insofar as those merits can be assessed at a preliminary stage. In some situations, a case that only meets the low threshold but stands little chance of success can be considered to be different from a case that is established on a *prima facie* basis. Not all cases are capable of being assessed in that way at the motion stage.

[74] With respect to Neil Myers there is a powerful case that he acted in breach of his contractual obligations to IRG under the terms of the franchise agreement. There is of course a case to be made against Greg Ross but it is far from being a foregone conclusion. I hasten to add that "a foregone conclusion" is not the test to be applied.

[75] Mr. Ross had no contractual obligations with respect to IRG. The tort claims will be very difficult to prove based on the evidence put forward at the motion. The argument that Mr. Ross and Alumni Bros are proxies for Neil Myers may have more basis in the evidence but that too will present a challenge. The evidence supports the narrative that has Mr. Ross simply wanting to open a restaurant with Mr. Myers' involvement absent any intention to circumvent the non-competition provisions of Mr. Myers' franchise agreement. Neither Mr. Ross nor Alumni Bros, according to that reasonably supportable version, were acting for that purpose.

[76] If the injunction is granted, the Pannizza franchise will remain unopened. Greg Ross himself has given evidence that if he is not able to open he will face business and personal bankruptcy. That is not a certainty but it was not contested as being a reasonably likely outcome. The consequences would then potentially be catastrophic for him. A trial on the merits might not ever take place in that event. Mr. Ross would in that case not be compensated for the losses resulting from the granting of the injunction. If the injunction is granted relying on affidavit evidence filed at the motion stage, IRG will have managed to eliminate a potential competitor before it even has a chance to open. That would be based on claims that, while neither frivolous nor vexatious, are not overwhelmingly convincing either.

[77] If the injunction is not granted against Greg Ross there will still be an injunction against Neil Myers. Mr. Myers will be enjoined from having any involvement with the Pannizza franchise. Pannizza will be able to open, having had the benefit of the assistance of the Pizza Delight franchisee contrary to his agreement with IRG. It is a matter of lost business profits and not permanent damage to the reputation of IRG or Pizza Delight. There is no evidence to suggest that the opening Pannizza will destroy the Antigonish Pizza Delight location, much less IRG, or that it would damage the business reputation or goodwill of IRG.

## **Conclusion**

[78] The case against Neil Myers is a strong one. He is consenting to an injunction that prevents him from being involved with Pannizza.

[79] The case against Greg Ross will be more challenging to prove. It may face significant legal and evidentiary hurdles. The damages that IRG or Pizza Delight would suffer if its case does succeed against Greg Ross will not involve the loss of something irreplaceable and while they may involve the loss of profits they will largely be compensable in monetary damages. The loss to Greg Ross if an

injunction is granted will be far more devastating. The balance of convenience does not favour the granting of the injunction.

[80] The motion to have the interim injunction continue in place as an interlocutory injunction against Alumni Bros Inc. and Greg Ross is not granted.

**Costs**

[81] Neil Myers has consented to an injunction. He should not be required to pay costs but neither should IRG be required to pay his costs.

[82] IRG has not been successful on the motion against Greg Ross. Greg Ross is awarded costs as against IRG. The motion involved two half days and costs of \$2,000 are ordered payable forthwith.

Campbell, J.