CITATION: Sirianni v. Country Style, 2012 ONSC 881
COURT FILE NO.: 08-CL-7458
DATE: 20120206

ONTARIO

SUPERIOR COURT OF JUSTICE

B E T W E E N:	
1159607 ONTARIO INC. JOSEPH SIRIANNI AND EUGENE SIRIANNI	Ben Hanuka, for the Plaintiffs
Plaintiffs	
- and -	
COUNTRY STYLE FOOD SERVICES INC., COUNTRY STYLE REALTY LIMITED, AND MELODY FARMS SPECIALTY FOODS AND EQUIPMENT LIMITED	Arnold Zweig, for the Defendants
Defendants	
AND BETWEEN:	
COUNTRY STYLE FOOD SERVICES	
Plaintiff by counterclaim	
-and-	
EUGENE SIRIANNI AND JOSEPH SIRIANNI	
Defendants by counterclaim	
	HEARD: November 14, 15, 17 and 18 2011

MESBUR J

REASONS FOR DECISION

Introduction:

[1] In 1995 the plaintiffs, Joseph Sirianni and his brother Eugene, entered into a franchise agreement with Country Style Food Services Inc. (Country Style) to operate a Country Style store. Their numbered company, the plaintiff 1159607 Ontario Inc. (1159607) was the actual franchisee, with the Siriannis guaranteeing 1159607's obligations. The franchise agreement provided for a ten-year term, running from February 8, 1996 to February 28, 2006, with two five-year renewal options.

[2] As part of the franchise arrangement the plaintiffs also entered into a sublease for the premises for the store. The store was well located on Davenport Road in Toronto, adjacent to the George Brown College campus. The college provided a large and hungry customer base of 15,000 students for the operation.

[3] The Siriannis operated the franchise for ten years without incident. The issues in this case arise as a result of events surrounding attempts to renew the franchise agreement and the status of the lease and sublease of the Davenport store. Central to these issues is the question of the extent to which the provisions of the *Arthur Wishart Act*[1] apply to the events that occurred.

[4] The plaintiffs take the position they renewed the franchise agreement for a five-year term effective April 1, 2006. They say that as a result, the defendants were under an obligation to provide all the disclosure mandated by section 5 of the *Act.* They say what the defendants provided was woefully inadequate, making the disclosure tantamount to no disclosure at all. As a result, they argue they had the right to rescind the franchise agreement for a period of two years following the renewal agreement's effective date. They say they have done so properly and are thus entitled to a refund of all money paid to the franchisor or franchisor's associate under the provisions of section 6(6) of the *Act.*

[5] The plaintiffs also rely on the duty of good faith the *Arthur Wishart Act* imposes on franchisors and franchisees in their dealings with one another.[2] The plaintiffs say Country Style's conduct flagrantly breached that duty of good faith. Therefore, the plaintiffs take the position they are also entitled to punitive damages.

[6] The defendants say that after the initial ten-year term ended at best the plaintiffs had a month to month arrangement with the defendants, since the plaintiffs

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[1] *Arthur Wishart Act (Franchise Disclosure) 2000*, S.O. 2000 Chapter 3, as amended
[2] Section 3(1) of the *Arthur Wishart Act*

did not execute a new franchise agreement or sublease. As a result, the defendants take the position they had no disclosure obligations. Even if they did, they suggest what they provided met the requirements of the *Act.* If it did not, they say the disclosure was no more than the equivalent of late disclosure. As a result, they take the position that if the plaintiffs wished to rescind, they had to do so within a period of 60 days from the date of the agreement. Even if a two-year rescission period applies, the defendants say the plaintiffs failed to rescind within two years and are therefore not entitled to the return of anything they paid under the franchise agreement.

[7] The defendants deny any breach of good faith, and say they have no obligation to pay punitive damages. The defendants go further, and assert a counter claim against the Siriannis on their guarantee. The counterclaim is for just over $47,000 in unpaid fees and expenses, plus interest.

The facts as I find them:

[8] Country Style is a franchisor. Its Country Style restaurants sell coffee, baked goods, deli products and sandwiches. Its main competitor is the Tim Hortons franchise. Country Style finds and leases locations for its stores through its franchise associate, the defendant Country Style Realty Limited. (Country Style Realty). Country Style supplies food and beverage products and equipment to franchisees through the defendant Melody Farms Specialty Foods and Equipment Limited.

[9] Country Style Realty enters into leases of premises for its locations, and then subleases the premises to the franchisee for that location. In this case, the landlord was 114953 Ontario Limited/Robpetmar Limited.

The Davenport Road lease

[10] In April of 1995 Country Style Realty entered into an offer to lease with Robpetmar to lease premises on Davenport Road in Toronto. On December 19, 1995 they executed the actual lease to use the property as a Country Style restaurant. The lease was for a term of ten years, with two five-year renewal options. Renewals were to be on the same terms and conditions as the original lease, except that the rent was to be adjusted at the time of renewal. Article 9 of the lease deals with renewals. For both renewal terms, the lease says the "new rental figure will be mutually agreed upon by both parties, based on the then current rents for similar space in the nearby area." If the landlord and tenant cannot agree, then "it shall be decided by arbitration in accordance with the Arbitration Act of Ontario."

The initial franchise agreement

[11] On December 5, 1995 the Siriannis and their company, 1159607 entered into a franchise agreement with Country Style and a sublease of the premises on

Davenport with Country Style Realty. 1159607 was the franchisor and sublessor, with the Siriannis acting as guarantors under both agreements. Both the franchise agreement and the sublease had a term of ten years, running from February 8, 1996 to February 27, 2006. Both the franchise agreement and sublease had two five-year renewal options.

[12] Joseph Siriannl testified that the first seven or eight years of the franchise operation were good. Being close to George Brown College was good for business – students formed part of the prime target market for the store's products, and there were 15,000 of them. In years nine and ten he said the store mostly broke even, but began to lose some money. Joseph Sirlanni attributed this in large part to Tim Hortons locations opening up in two nearby gas stations, as well as in the George Brown campus building itself.

[13] By the time the first ten years of the franchise was nearly up, Joseph Sirianni testified that he was no longer working the same number of hours in the store as he had before. In 2005 he had been offered a part time position at George Brown College and accepted it. He and his brother started to think about selling the franchise. The franchise agreement permitted a sale under certain conditions.

[14] In the meantime, the franchise agreement and the sublease were coming to the end of their first term. Country Style would have to take steps under the head lease to seek a renewal.

Country Style's renewal negotiations with the landlord

[15] Country Style had to give the landlord notice of its intention to exercise the first renewal option by March 31, 2005. In February of 2005, Country Style's real estate committee met and decided to exercise the option. A Country Style internal email of March 3, 2005 confirms the real estate committee's decision, and states that the option is for the period April 1, 2006 to March 31, 2011.

[16] On March 29, 2005 Country Style wrote to the landlord, Robpetmar, giving formal notice of exercising the first of two renewal rights under the lease. The letter says "the 1st renewal term shall be for the five (5) year period commencing April 1, 2006 and expiring March 31, 2011." It is not clear why the renewal was to start on April 1 rather than February 28, or March 1.

[17] On March 31, 2005 another Country Style internal email confirmed that Country Style had exercised the renewal option, with the option period starting April 2006. In another internal memo about this location, dated January 12, 2006, Country Style says: "another issue ... is the fact that the option to renew this lease for the period April 1, 2006 to March 31, 2011 has been exercised."

[18] Country Style Realty then began discussions with Robpetmar about a new rental rate. Country Style Realty took the position that the current rent was above market. For its part, Robpetmar sought an increase of more than $10 per square foot, partly because it knew Tim Hortons was interested in the location and was prepared to pay $40 per foot in rental. Robtemar's request represented an increase of 50% over the then current rate of $26.67 per square foot. By January of 2006, Robpetmar was taking the position that if Country Style Realty did not agree to $40 a foot then they would rent the space to Tim Hortons instead.

[19] Robpetmar then increased its demand. In early February of 2006, it gave Country Style Realty formal notice that it was seeking a renewal rate of $45 per square foot. Country Style Realty responded by saying it would require arbitration under the lease in order to determine market rent. They then agreed on a temporary arrangement leaving rates as they were. In its letter to Country Style dated February 9, 2006, the landlord confirmed the new term, saying "... further to your Notice dated March 29, 2005 to exercise the first of two renewal options commencing April 1, 2006 ..." before dealing with other issues in the letter.

[20] Country Style responded to the landlord on February 22, 2006, saying: "we would like to meet to review the rental rates for the renewal of the lease from April 1, 2006 to March 31, 2011."

[21] In the meantime, Country Style Realty commissioned an expert report regarding market rent. In late February of 2006 the appraiser opined that market rent was only $30 per square foot.

[22] The landlord pressed Country Style Realty for its position. By May, the rent had fallen into arrears. The landlord wrote Country Style saying:

> Recognizing we have had no response from our meeting and letters and no notice of Arbitration or other proposed disposition with the lease; we have received instructions to notify you that in the event the outstanding rents of $7,811.27 are not received on account within ten days, this will be deemed to constitute a default of the Lease and we are to proceed immediately thereafter with remedies. Please govern yourselves accordingly.

[23] Through the summer and fall of 2006 Country Style and Country Style Realty considered their positions regarding the Davenport location. Country Style's internal email of September 28, 2006 says, "The lease for this store was renewed for the period April 2006 to March 2011 ... off the record ... the landlord would like Country Style to leave so that he can lease the space to Horton's and is unwilling to negotiate more reasonable rents ..."

[24] By October of 2006 Country Style Realty had retained counsel to deal with the lease issue. Counsel took the position with the landlord that Country Style Realty had exercised the first lease extension so that it would expire on March 31, 2011. He wrote the landlord's counsel to that effect, adding "the only outstanding issue is the determination of the Minimum Rent payable during the first extension term." The letter went on to confirm that the parties had agreed to arbitration, and attached a list of potential arbitrators to conduct it.

[25] On October 20, 2006 the landlord responded with a formal demand for arbitration. Between then and early 2007 the landlord and Country Style Realty planned for the arbitration which was scheduled for February 2007.

[26] From late 2005 and through 2006 Country Style also had discussions with the Siriannis about a renewal of the franchise agreement.

Initial renewal discussions with the Siriannis

[27] While Country Style Realty's discussions with the landlord were ongoing, Country Style began to have some renewal discussions with the Siriannis. Although the franchise agreement and sublease were clear they were for a term of ten years, with two five-year renewal options, Mr. Sirianni assumed they had a twenty year deal with Country Style. He said that sometime in late 2005 they had a visit from Country Style's regional manager, asking if they intended to continue with the franchise. He said their meeting was cordial, and he thought it was just a formality. They did not discuss any new rental terms.

[28] In mid February of 2006 Janet Gould, the Country Style Property Administrator, advised the Siriannis that their base rent was unchanged, and their common area maintenance charges (known as "CAM") would be reduced.

[29] Although both the franchise agreement and sublease had terminated at the end of February 2006, as between the Siriannis and Country Style, no one took any steps to end either agreement. The Siriannis continued on as they had before.

The Siriannis receive a package of disclosure documents

[30] The Siriannis' next contact from Country Style occurred in June of 2006, when Country Style sent them a package of what were called disclosure documents. In 1996 when the Siriannis had first become franchisees, the *Arthur Wishart Act* was not yet in force. When it became law in 2000, it imposed significant disclosure obligations on franchisors. The package of information the Siriannis received was somewhat generic – it did not include, for example, a new sublease, or copy of a new head lease. It did, however, include all the financial information mandated by the *Arthur Wishart Act.*

[31] The cover letter enclosing the disclosure documents said:

> Our records indicate that the Franchise Agreement for the above-noted Country Style store expired on February 27, 2006 and there are two (2) five(5) year options to renew.
>
> While no additional franchise fee is applicable, new franchise documents have to be completed at this time.
>
> Enclosed also is our Ontario Disclosure document dated June 1, 2006 and Receipt of disclosure document form. The *Arthur Wishart Act* (Franchise Disclosure), 2000 requires that a prospective franchisee receives the disclosure document at least fourteen (14) days before signing any agreement or payment of any consideration relating to the franchise.
>
> Please date and sign the Receipt of Disclosure document form upon receipt and return to our offices as soon as possible. Following the fourteen (14) day period, we will forward franchise documents to you.

The Siriannis signed the receipt and returned it to Country Style.

[32] Then in September of 2006 Country Style sent the Siriannis a package of documents to sign. These included a new franchise agreement, but without a sublease. The draft franchise agreement had a term running from February 28, 2006 to March 1, 2011. This term, of course, did not coincide with the term under the lease renewal. It purported to commence prior to the lease renewal. Country Style told the Siriannis the sublease would be provided when the rental terms were finalized. Country Style also sent a sign rental agreement, guarantee and postponement of claim, general security agreement and restrictive covenant and confidentiality undertaking. Country Style asked the Siriannis to sign these documents and return them to Country Style. The Siriannis said they would do so when they received a sublease for signature as well. They wanted to have the entire package of documentation in hand before signing anything.

[33] In October of 2006 Country Style called the Siriannis to see why they had not signed and returned the franchise agreement and other documents. The Siriannis explained they would do so when they received the sublease with the new rental terms. In the meantime, they continued as they had before.

[34] Later in October of 2006 the Siriannis met with Ron Slater, Country Style's vice president of real estate and construction, to discuss how Country Style Realty's negotiations with the landlord were going. Mr. Slater advised the Siriannis the landlord was demanding an exorbitant increase. They discussed options, including whether the Siriannis were interested in terminating the lease. The Siriannis advised Mr. Slater they saw their only option as continuing with the lease. As Joseph Sirianni explained, he did

not see the demand for a large increase as a huge problem; he simply assumed it was the landlord's aggressive starting position that would eventually be resolved, by arbitration if necessary. Mr. Sirianni testified they left the meeting with the understanding Country Style was going to pursue binding arbitration with the landlord.

[35] The Sirlannis were also concerned about what renovations they would be required to undertake on the store in order to fulfil their obligations as franchisees. They requested a scope of work from Country Style. Mr. Slater apparently told them the process was ongoing, and when the scope of work was available it would be provided to the Siriannis.

[36] At the same time, Country Style advised the Siriannis that Country Style's real estate appraiser had provided them with an expert opinion as to fair market rent for their location. In his opinion, $30 per square foot was market rent. In the Siriannis' view, this made arbitration even more attractive. They assumed an arbitrator would give the opinion a lot of weight in determining rent for the renewal period.

[37] In November of 2006, Country Style's Property Administrator, Janet Gould, wrote to the Sirlannis to follow up "about the rents payable for the renewal period for this lease."[3] The letter refers to the Siriannis' meeting with Ron Slater, and says:

> After your meeting you were going to take some time to consider the future of the store; the amount by which the sublease rents should be increased until the arbitrator's decision is made and how you would like to deal with the sublease shortfall from March 1, 2006 onwards.

The letter goes on to discuss various possibilities for rent increases, and states that Country Style and the landlord "have begun preparations for an arbitration ... in the 'worst case scenario', your sublease rents should be increased to $106,575 per year, with a shortfall from March 1, 2006 to December 31, 2006 of $36,312.50 to be collected immediately."

[38] The letter finishes with the comment: "The other alternative is to begin to negotiate a termination of the lease with the landlord." Joseph Sirianni testified this last statement came as a complete shock to him. The Siriannis did not respond to the letter.

[39] On December 1, 2006 Ms. Gould noted on Country Style's file copy of the letter that they had not yet received a response from the franchisees and that Mr. Slater, would follow up with the Siriannis. By January 24, 2007 the Siriannis had still not replied.

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[3] Letter at tab 69 of Exhibit 2 at trial.

The Siriannis find a potential purchaser

[40] As I have mentioned, Joseph Sirianni began to spend less time at the store than he had before. His job at George Brown took more of his time. He and his brother thought about selling their franchise.

[41] In February of 2007 the Siriannis received an offer from Mr. Anthony Vivona to purchase the franchise. After some negotiation, they agreed on a price of $320,000, and signed a purchase agreement. Among other things, the agreement was conditional on the landlord and sub-landlord having given written consent to the assignment to the purchaser of the balance of the lease. It also provided for the term of the lease to be extended for a period of five years, with a further five-year renewal option. One of the difficulties the Siriannis faced is that there was no sub-lease in place.

The arbitration

[42] As I have mentioned in February of 2007 Country Style and the landlord had planned to go to arbitration. They had chosen an arbitrator and begun to complete the necessary documentation to begin the process. Instead of proceeding with the arbitration, Country Style and the landlord continued to negotiate, in the hopes of resolving the issue.

[43] One of Country Style's concerns was if the arbitration went ahead, and the arbitrator fixed the rental rate at a high figure, Country Style Realty would be obliged to continue to rent the premises at that rate for the next five years. The Siriannis had not signed any renewal documents, and if they did not, they could simply "walk", leaving Country Style Realty with a vacant store, no franchisee, and a 5-year obligation.

Country Style's internal discussions and decisions about the lease

[44] Country Style's real estate committee met regularly to discuss the status of its various franchise locations. The minutes for the committee's meeting in January of 2007 reflect that Country Style was in arbitration with the landlord about the Siriannis' location.

[45] The real estate committee met again on February 27, 2007. The minutes of this meeting in relation to the Siriannis' store say: "Currently in Arbitration. Previously Landlord agreed we could stay until Aug. if we leave quietly at the end of our term. Ron S. to confirm if Landlord will still offer this and the possibility to exit earlier." Janet Gould's personal notes of the meeting say:

> CSFS doesn't really want to renew. LL has offered to extend the lease for 1 year @ the same rents & then termination. Franchisees are to be told that they can stay for another year, but if they stop paying then store will be closed immediately. FR's are meeting with RS on March 1st, 2007...

[46] Although the minutes of the January meeting had referred to the lease issues being in arbitration, by late March of 2007 the committee's minutes note there is a "proposal with the landlord to terminate lease early". The minutes go on to record "franchisees have not been advised."

[47] The March 2007 minutes also make reference, in the discussion regarding the Siriannis' store, to "leaving quietly", but now says "probably" will go to arbitration.

[48] If, in fact, Country Style met with the Siriannis in early March of 2007, Country Style never told the Siriannis about the issues outlined in Janet Gould's notes.

Country Style Realty and the landlord make a deal

[49] Country Style and the landlord continued to negotiate. They did not proceed with arbitration. In mid March of 2007 Country Style proposed to resolve matters with the landlord on the basis of setting the rent at $29 per square foot from April 1, 2006. In exchange the landlord would agree to a termination of the lease at December 31, 2007. On April 1, 2007 Country Style and the landlord entered into a lease amending and extension agreement. It had a term of April 1, 2006 to December 31, 2007, with a provision that the premises would be vacated on December 31, 2007. The base rent was $30 per square foot.

[50] Country Style did not tell the Siriannis about this new agreement. In fact, in an email dated April 17, 2007 following the new agreement with the landlord, Janet Gould says:

> The franchisee **DOES NOT KNOW** that the lease and sublease termination dates have been moved forward from March 2011 to December 2007. Ken Monteith will be discussing that with the franchisees sometime in the next few months. The new termination date is therefore very confidential. [Bold and underlining in the original]

[51] Instead of telling the Siriannis about the arrangement with the landlord, Country Style's discussions with the Sirlannis took, and continued to take a very different tone.

Country Style's discussions with the Siriannis

[52] Country Style wrote to the Siriannis on May 2, 2007 saying, in part:

> Further to our discussions and meetings, an agreement has now been reached with the landlord for the new rents payable. This letter will serve to outline the terms and conditions with respect to the renewal of your sub-lease agreement related to the above-noted location.

[53] The letter goes on to outline the various rental amounts and sign rental charges, including arrears, and continues:

> We will require that the premises be renovated to a standard acceptable to Country Style in its sole discretion. We are currently reviewing the costing proposals provided by my construction staff and will be discussing our requirements with you in due course.
>
> Should, in our reasonable opinion, additional documentation be required to amend the current agreement to reflect the conditions outlined above, it will be prepared and forwarded to you for your signature in due course.
>
> Please acknowledge your agreement with the above by signing the duplicate copy hereof and returning it to me at your earliest convenience.

[54] The Siriannis did exactly that. They immediately signed the acknowledgment and returned it to Country Style. Conspicuously absent from the letter was any reference to the new termination date Country Style had negotiated with the landlord.

[55] Meanwhile, Country Style's real estate committee continued to meet and discuss the Siriannis' store. The minute of the May 25, 2007 meeting record:

- Lease will terminate December 31, 2007
- Franchisee has NOT yet been advised
- Approach landlord in October to request rent reduction
- With respect to Franchisee's wish to sell the franchise: advise that sale of Franchisee [sic] will NOT be approved until A/R is cleared
- Since lease will terminate on Dec. 31, 2007, resale cannot be approved.

[56] The real estate committee's minutes note in September of 2007 that the Siriannis' store is to close at lease termination on December 31, 2007, and that Country Style will reopen rent negotiations with the landlord in October.

[57] The November minutes confirm the store is to close at lease termination on December 31. They go on to say:

- We are prepared not to renew based on excessive new rates required by LL [i.e. landlord]
- Ken to speak with F.R. [i.e. franchisee]
- Bob to discuss our risk with Arnie [presumably their lawyer, Mr. Zweig]

[58] In mid-January of 2008 Country Style's Franchise Coordinator wrote to the Siriannis, saying:

> Our records indicate that the franchise agreement and sublease agreement for the above-noted Country Style expired on February 27, 2006 and there are two (2) five (5) year options to renew. To date you have not returned signed agreements to us and we have been negotiating renewal terms with the landlord.
>
> The landlord has agreed to let the store operate on a month-to-month basis at the current rates and accordingly we will extend your franchise agreement and sublease agreement on a month-to-month basis with thirty (30) days written notice.
>
> This letter in no way waives and rights that Country Style has or may have under the agreements or termination provisions thereof and by permitting a month-to-month carryover, the franchisor in no way admits that there has been any renewal of any franchise agreement or sublease agreement.

[59] Joseph Sirianni testified this letter came as complete surprise. I have no doubt that it did. First, he thought he had made it clear to Country Style they would only sign all the formal agreements once all were ready for signature. Second, he was bewildered by the statement they were on a month-to-month arrangement. As he explained it, they had had a letter in the previous May that said they had an agreement. Country Style had asked them to sign it if they agreed with its terms. Since they agreed, they signed. Mr. Sirianni said he and his brother couldn't understand why Country Style was acting like this. He described this time as like being on a roller coaster, with Country Style changing its position from one moment to the next.

[60] In late January of 2008, the Siriannis had a meeting with representatives of Country Style. Joseph Sirianni testified that he arranged the meeting to discuss the issues of rent, renovations, scope of work and marketing strategy. The first thing he raised in the meeting was whether the Country Style representative would sign any documents if they were not complete. When he responded "no", Mr. Sirianni asked him why Country Style was pestering to sign incomplete documents. By that he meant Country Style's request that the Siriannis sign various franchise documents, but without the sublease. At this meeting, Country Style made no mention of the new agreement it

had reached with the landlord that had terminated the lease effective December 31, 2007.

[61] Some weeks after the meeting, Mr. Sirianni sent Country Style a memo outlining what had been discussed at the meeting. The items included a discussion of coupons, changing the store to weekly rent withdrawals, cleanliness issues in the store, and ongoing landlord negotiations and store renovations. Last, the outline refers to the Siriannis advising Country Style about a potential buyer for their store.

[62] The discussion around coupons and changing the store to weekly rent withdrawals instead of monthly rental payments arose because of the problems the Siriannis were beginning to have with profitability. Cleanliness issues were a concern for the franchisor. It began to see the Davenport location as a sub-par store.

[63] Although Country Style had entered into a new lease arrangement with the landlord with a termination date of December 31, 2007, even at this January meeting, Country Style did not mention to the Siriannis that the head lease was technically at an end, and thus Country Style Realty and the franchisee were leasing on a month-to-month basis only. Instead, they told the Siriannis that their negotiations with the landlord were "in good shape", that Country Style "had proposed a new 10 year Rental arrangement with the Landlord at a rate of $30/square foot", and that "they were in the final stages of negotiation" and were "waiting to hear back from the Landlord over the next couple of weeks." Again, Country Style neglected to mention it had intended to reopen negotiations with the landlord in October of 2007, presumably for a different franchisee.

[64] At this meeting, the Siriannis also raised their understanding that "Ron [Slater] had reached and [sic] agreement with the landlord of $30/square foot back in the spring of 2007 and that he had documented this in an official letter to Joe and Eugene dated May 2, 2007."[4]

[65] Country Style received this memo from the Siriannis, summarizing their meeting of January 31, 2008. Country Style never raised any issue about the accuracy of the summary. I therefore conclude it accurately summarized what was discussed at this meeting.

A second offer to purchase the franchise

[66] At the end of January of 2008, Mr. Vivona, the potential purchaser, made a second offer to purchase the franchise from the Siriannis. Again, it was subject to the same conditions as his first offer had been. Because of these conditions, the Siriannis could not proceed with the purchase. In any case, Country Style was clear in its own

[4] Summary of January 31, 2008 meeting among Ken Monteith, Bob Vrenjak, Joe Sirianni and Eugene Sirianni. Tab 127, exhibit 2

mind that it would not consent to a sale. It did not, however, communicate this to the Siriannis.

Events in February and March of 2008

[67] Country Style Realty did continue to negotiate with the landlord, but not with a view to keeping the Siriannis as franchisors in the Davenport store. Nevertheless, Country Style wrote, the Siriannis at the end of February, 2008 telling them a renovation of $100,000 would be required on renewal.

[68] This was followed a few days later with a letter from Country Style to the Siriannis, alleging "operational non-compliance." A few days later, Country Style's lawyer sent a default letter to the Siriannis. At this point, the Siriannis were behind in their rent. They had been trying to find a solution to the reduction in revenues at the store. They found Country Style most unhelpful.

The Siriannis give notice of rescission and vacate the premises

[69] On March 20, 2008 the Siriannis delivered written notice to Country Style of their intention to rescind the franchise agreement and seek damages under the *Arthur Wishart Act.* Pursuant to that notice, they vacated the store, leaving the premises clean and organized. They commenced this proceeding in August of 2008.

[70] I turn now to the law and its application to these facts.

The law and analysis:

The legal framework

[71] The *Arthur Wishart Act* came into force in 2000. It is a franchisee-friendly piece of legislation designed specifically to protect the interests of franchisees, particularly when it comes to the issue of disclosure. The Court of Appeal described the purpose of the *Act* in this way in *Personal Service Coffee Corp. v. Beer (c.o.b. Elite Coffee Newcastle)* [5]:

> It is clear, therefore, that the focus of the *Act* is on protecting the interests of franchises. The mechanism for doing so is the imposition of rigorous disclosure requirements and strict penalties for non-compliance.

The *Act* accomplishes its purpose in a number of ways.

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[5] 2005 O.J. No. 3043 (O.C.A.)

[72] First, section 3 imposes an obligation of fair dealing on each of the parties to a franchise agreement. Franchise agreements are broadly defined in section 1 as "any agreement that relates to a franchise between a franchisor or franchisor's associate and a franchisee.

[73] Second, franchisees are given a right to associate with other franchisees. No franchisor can interfere with a franchisee's right to do so. If it attempts to do so, or if it purports to limit the franchisee's right to do so, the franchisee has a right to claim damages against the franchisor.

[74] Third, the franchisor has specific disclosure obligations which it must fulfil before the franchisee signs the franchise agreement or pays any franchise fees. It must do so at least fourteen days before the franchisee either signs or pays fees. The disclosure obligation is ongoing, since disclosure includes a franchisor's obligation to disclose any material changes as soon as practicable after the change has occurred.

[75] The information in a franchisor's disclosure document or statement of material change must be accurate, clear and concise. Not only that, the *Act*, in subsection 7(1) creates a right of action for a franchisee to claim damages for a franchisor's misrepresentations or failure to disclose. The *Act* , in subsection 1(1) defines "misrepresentation" as including:

> An untrue statement of a material fact, or an omission to state a material fact that is required to be stated or that is necessary to make a statement not misleading in the light of the circumstances in which it was made.

[76] Fourth, the franchise disclosure documents must include prescribed material facts, financial statements, copies of all proposed franchise agreements and other agreements relating to the franchise to be signed by the proposed franchisee, along with prescribed statements for the purposes of assisting the prospective franchisee in making informed investment decisions.

[77] Section 2(1) of the *Act* makes it clear that it applies both to a franchise agreement entered into after the *Act* comes into force, or to "a renewal or extension of a franchise agreement entered into before or after the coming into force of this section, and with respect to a business operated under such an agreement, renewal or extension ..."

[78] The disclosure obligations under the *Act* are not absolute. Subsection 5(7)(f) provides an exemption where there has been no material change since the franchise agreement or latest renewal or extension was entered into. Subsection 5(7)(g) also exempts a grant of a franchise that is valid for less than a year from

disclosure obligations. The exemption applies only if it also does not involve payment of a non-refundable franchise fee.

[79] The *Act* defines the term "material change" in subsection 1(1) as:

> ... a change in the business, operations, capital or control of the franchisor or franchisor's associate, a change in the franchise system or a prescribed change, that would reasonably be expected to have a significant adverse effect on the value or price of the franchise to be granted or on the decision to acquire the franchise and includes a decision to implement such a change made by the board of directors of the franchisor or franchisor's associate or by senior management of the franchisor or franchisor's associate who believe that confirmation of the decision of the decision by the board of directors is probable.

[80] Subsection 1(1) goes on to define "material fact" as including:

> 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.

[81] Last, failure to disclose can result in significant consequences for a franchisor. First, the franchisee has a right to rescind the franchise agreement where the franchisor has either made inadequate disclosure or no disclosure. Second, if a franchisee rescinds a franchise agreement, it is entitled to a return of all money it has paid to the franchisor or franchisee's associate.

[82] Where a franchisor has made late disclosure the franchisee has a period of 60 days after receiving the disclosure document to rescind the franchise agreement without penalty or obligation.[6]

[83] Where a franchisor has failed to make disclosure at all, the franchisee may elect to rescind the franchise agreement within two years of the date of entering into the franchise agreement.[7]

[84] Subsection 6(6) sets out the franchisor's obligation to refund any money it has received from the franchisee other than money for inventory, supplies or equipment. It is required to repurchase any inventory, supplies or equipment, as well as compensate the franchisee of any additional losses it incurred in acquiring, setting up and operating the franchise.

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[6] Subsection 6(1) of the *Arthur Wishart Act*
[7] Subsection 6(2) of the *Arthur Wishart Act*

[85] Not only must the franchisor make the refund set out above, it also must pay damages if a franchisee has suffered a loss because of a misrepresentation contained in the disclosure document. Franchisees are deemed to have relied on any misrepresentation contained in a disclosure document.

The questions for this case

[86] This case requires me to answer the following questions in the context of the facts as I have found them, and the legal framework outlined above:

a) Was the franchise agreement renewed/extended?

b) If it was, what were the terms of the renewal/extension?

c) Was disclosure required?

d) If it was, did Country Style make adequate disclosure?

e) If it did not, did its failure result in a 60-day rescission period or a two-year rescission period?

f) If the plaintiffs had a two-year rescission period, when did the period begin?

g) Did the plaintiffs properly rescind?

h) If the plaintiffs properly rescinded, what are their damages?

i) If the plaintiffs are entitled to damages, do these include punitive damages or damages for misrepresentation?

j) What about the counterclaim?

[87] I will answer each of these questions in turn.

Renewed or extended?

[88] Country Style does not argue the franchise agreement was never renewed. It says, however, that at best, the franchise agreement was renewed on a month to month basis, at least from December 31, 2007. Alternatively, it says if the original franchise agreement was renewed, its renewal would have been with effect February 27, 2006, since that was the commencement date in the franchise agreement Country Style sent the Siriannis.

[89] In contrast, the Sirlannis say the renewal was for a period of five years, commencing on April 1, 2006. As I understand it, they say April 1, 2006 is the new

commencement date for the franchise agreement because all the lease renewal discussions between Country Style and the landlord referred to an April 1, 2006 commencement date for the first lease renewal option, and second, the May letter makes reference to back rents being calculated from April 1, 2006.

[90] I agree with neither party's position.

[91] In my mind, the May 2007 letter is the pivotal event that changed the relationship between the parties after the initial terms under the franchise agreement and sublease had ended. Mr. Zweig (who had no hand in drafting the letter) readily conceded the letter is less than felicitous in its terms. He described it as a "terrible letter, a ridiculous letter. It's ambiguous and makes no sense for a lot of reasons." That said, I must take the letter as I find it, and attempt to interpret it in light of all the surrounding circumstances. Since it is the franchisor's letter, using the doctrine of *contra proferentum,* I construe any ambiguity in it against the drafter – that is, Country Style.

[92] The letter outlines a number of things. First and foremost, it says that Country Style has finally resolved the issue of the lease with Robpetmar. It goes on to set out what the back payments under the new arrangement are, and what the ongoing payments will be. Since the letter makes no mention of a shorter term to this new arrangement, one could reasonably infer that the "conclusion of discussions with the landlord" meant successfully negotiating a new 5-year term.

[93] The letter invited the Siriannis to sign it, if they agreed with its terms. They did. They signed it, thus creating a binding agreement. The *Arthur Wishart Act* defines "franchise agreement" very broadly as any agreement that relates to a franchise between,

a) a franchisor or franchisor's associate; and

b) a franchisee.

[94] Since the May 2 letter related to the franchise, namely the sublease of the premises with the franchisor's associate, namely Country Style Realty, as well as ongoing payments for sign rental and potential renovation costs for the franchise location it constitutes a franchise agreement. What, then, were its terms?

Terms?

[95] The May 2 letter is the only document both Country Style and the Siriannis signed after the initial terms under the franchise agreement and sub-lease expired.

[96] The clear implication of the agreement is that it was on the same terms and conditions as the original arrangements between the parties, with no further documentation required unless the franchisor, in its absolute discretion, deemed it necessary. Since Country Style did not present any further documents to paper the transaction, it seems to me a franchisee could reasonably infer that all documents necessary to continue the franchisee/franchisor relationship were subsumed in the May 2, letter agreement.

[97] I also infer from the May 2 letter that it was intended to deal with more than simply the lease/sub-lease arrangements. It deals with the cost of sign rental, which was covered by a separate sign rental agreement in the original group of documents. It also deals with potential renovation costs, which can only be seen as part of the overall franchise agreement.

[98] The Siriannis knew the franchise agreement and sub-lease had ended at the end of February 2006. Since nothing new was signed until May of 2007, I conclude the Siriannis' store was operating on a month to month basis – both as to the franchise agreement itself, and as to the tenancy. The letter, however, changed everything. When I look at it from the point of view of the franchisees, I can only infer that they understood it to establish a new five-year term for both the franchise agreement and the sublease. The letter suggests that is the case. The Siriannis had no way of knowing anything different.

[99] Country Style, however, seems to take the position that since the extension agreement between Country Style Realty and the landlord regarding the head lease terminated on December 31, 2007, from that point forward the Siriannis were simply month-to-month tenants on the sublease, and month-to-month franchisees on the same basis.

[100] I simply cannot accept this argument. Country Style is really saying it is entitled to rely on a term of the renegotiated head lease that it deliberately and repeatedly kept hidden from the franchisee. To suggest that the franchisee is bound by this hidden term, to the benefit of the franchisor, flies in the face of the underlying purpose of the *Act* - that is, to provide franchisees with adequate disclosure to make informed decisions.

[101] When I look at the May 2007 agreement in the context of the overall purpose of the *Arthur Wishart Act*, I am drawn to the inescapable conclusion that both the franchise agreement and sublease were renewed for a period of five years from that point onward. That is the arrangement between the franchisor and franchisee. In my view, the franchisor cannot rely on its separate and secret agreement with the landlord in order to deprive the franchisee of the rights that the franchisor purported to establish for it in the May 2007 letter.

[102] I therefore conclude that as between Country Style and the Siriannis, the May 2, 2007 letter created a new franchise agreement, with a term to May, 2012 (that is, a new five-year term). The next question is whether this new agreement required disclosure, and if it did, what sort of disclosure was needed.

Disclosure required?

[103] The *Act* provides that the franchisor does not need to make disclosure at the time of renewal if and only if there have been no material changes to the franchise arrangement. If, however, there have been changes when the agreement is renewed, disclosure is required. The disclosure requirements in the *Act* apply specifically to renewals as well as to new franchise agreements.

[104] Changing the term of a lease from five years to 21 months is a fundamental change to the renewal terms. Thus, Country Style was obliged to make all the disclosure required by the *Act*. It was obliged to disclose this fundamental change. It did not.

[105] The *Act* exempts franchise agreements of less than a year from the *Act's* disclosure requirements. Therefore, for the period the arrangement was only a month to month franchise agreement(s), no disclosure is required. The May 2007 agreement created a new franchise arrangement with a five year term. Therefore, at that point Country Style was required to make disclosure according to the *Act*. The next question is whether Country Style's disclosure was adequate.

Disclosure adequate?

[106] Country Style had sent some generic disclosure documents to the Siriannis the previous year. They also sent a package of documents including a new franchise agreement, sign rental agreement, guarantee and other documents. The package did not, however, contain a sublease, but simply made reference to its coming in due course. What Country Style never did was to advise the Siriannis about the new extension agreement it had reached with the landlord that provided for its early termination.

[107] Instead, Country Style deliberately concealed a fundamental piece of information from the franchisee. They did not disclose the lease would end in December of 2007. They did this because they feared if the franchisee knew, it would leave the premises, and Country Style would be on the hook for the rent on the head lease.

[108] Hiding a fundamental term of the rental agreement for the premises is a deliberate withholding of critical information that would have an impact on a

franchisee's decision to renew. The May letter deliberately suggests a renewal of all the arrangements between the Siriannis and Country Style – including a discussion of what renovations the Siriannis would be expected to make to the premises as part of their ongoing franchise arrangement. The letter does not disclose the lease would terminate early. In *Mapleleaf Franchise Concepts Inc. v. Nassus Frameworks Ltd.* [8] the court held the location and length of continued operation of the franchise in the renewal term were material facts. I agree with the court's reasoning, and apply it to the facts here.

[109] Withholding such a material fact from disclosure makes the disclosure completely inadequate and tantamount to no disclosure. In *1518628 Ontario Inc. v. Tutor Time Learning Centres LLC* [9], the court found non-disclosure of material facts, and held "this non-disclosure of material facts in itself meant there was not compliance with the *act* as to the required disclosure." I come to the same conclusion here.

[110] As a result, I conclude Country Style's disclosure was so inadequate it constituted the equivalent of no disclosure at all.

Sixty-day or two-year rescission period?

[111] Since I have determined the disclosure was the equivalent of no disclosure, the two-year rescission period mandated by section 6(2) of the *Act* applies.

Beginning of rescission period?

[112] As I have already determined, the new five-year franchise arrangement was created with the letter of May, 2007, creating a five-year renewal term commencing in May 2007, and ending in May 2012. Under the provisions of the *Act,* the franchisees had a period of two years to rescind. This means they could have delivered a notice of rescission up until May of 2009.

Proper rescission?

[113] The Siriannis delivered their notice of rescission in March of 2009. They were thus within the two year period, and have properly rescinded the agreement. This leads to a discussion of the damages the franchisee is entitled to recover.

Damages

[114] Subsection 6.(6) sets out a franchisor's obligations to the franchisee when the franchisee rescinds the franchise agreement. It requires the franchisor or franchisor's associate to return to the franchisee "any money received from or on behalf of the franchisee, other than money for inventory, supplies or equipment." It goes on

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[8] 2011 CarwellAlta 1709 (QB)
[9] [2006] O.J. No. 3011 (S.C.J. Comm. List)

to require the franchisor to "purchase from the franchisee any inventory that the franchisee had purchased pursuant to the franchise agreement and remaining at the effective date of rescission, at a price equal to the purchase price paid by the franchisee." It also requires the franchisor to purchase from the franchisee "any supplies and equipment that the franchisee had purchased pursuant to the franchise agreement, at a price equal to the purchase price paid by the franchisee."

[115] Country Style takes the position that the *Act* means to exclude payments of rent and CAM from the calculation of damages. It suggests that the *Act* merely seeks to compensate a franchisee for its losses, namely expenses above income. Given the clear wording of the *Act* I simply cannot accept that argument.

[116] The *Act* is clear that the franchisee is entitled to return of any money it has paid to a franchisor or a franchisor's associate. Country Style admits that Country Style Realty is a "franchisor's associate" within the meaning of the *Act.*

[117] I interpret the term "money" in its every day usage. Surely, if a franchisor's associate is a sub-landlord, then the franchisee would be paying it rent and associated expenses in money. I therefore infer that rent and associated expenses must be repaid to the franchisor's associate. The legislation could easily have exempted rent from the calculation of a franchisee's entitlement on rescission. It did not. Thus, I conclude rent and associated payments the franchisee paid to Country Style Realty after May 2007 are part of what must be repaid to it.

[118] The plaintiff has submitted a comprehensive damages brief, which was filed as Exhibit 4 at trial. It sets out various headings for its damages as follows:

a) Base Rent

b) CAM

c) Tax Instalment

d) Sign Rent

e) Loan (for cappuccino machine)

f) Advertising/service fees

g) Equipment purchase

[119] But for its argument about rent and related costs (which I have rejected) Country Style concedes these are proper heads of damages, and accepts the amounts claimed. When I total the figures claimed, plus GST, they come to $147,346.81 from May 2007 onward.

[120] The franchisee has estimated the value of its inventory on hand at $21,000 and amounts to Flanagan Food Service at $19,383.24. Country Style has no problem with these estimates of value. Under the terms of the *Act,* the franchisor is obliged to acquire these items back from the franchisee. Country Style did not, and therefore owes these amounts. These figures bring the plaintiffs' damages to $187,730.05.

[121] The plaintiffs also claimed damages in relation to money they say Eugene Sirianni advanced to the franchise. They suggest this is part of their operating losses, and must be repaid under the provisions of subsection 6(6)(d). The difficulty with this claim is that I have no way of knowing whether the money advanced was used to pay the expenses I have set out above, and which already form part of the plaintiffs' damages. While the plaintiffs are entitled to recover, they are not entitled to double recovery. As a result, I decline to award any of these damages.

Punitive damages or damages for misrepresentation?

[122] The *Arthur Wishart Act* expressly contemplates damages for breach of the parties' good faith obligations to one another. The *Act* also creates a statutory right of damages for misrepresentation. Here, the plaintiffs argue that Country Style made a misrepresentation to them, entitling them to damages. They also allege that Country Style's actions constitute a breach of its duty of good faith to them.

[123] The essence of the plaintiffs' position is that Country Style deliberately withheld information about the lease from them, namely the early termination. They say this is equivalent to an "omission to state a material fact that is required to be stated or that is necessary to make a statement not misleading in the light of the circumstances in which it was made." I agree.

[124] The term of the lease was clearly a material fact. A five year term, as opposed to a month to month term, or a 21-month term could reasonably be expected to have a significant effect on the value or price of the franchise to be granted or the decision to acquire or continue with the franchise. I include in this the decision to renew the franchise. Country Style deliberately withheld a material fact, thus making a misrepresentation to the franchisee.

[125] The *Act* makes a presumption that a franchisee has relied on a misrepresentation. What, then, are the losses the franchisee has suffered because of the misrepresentation? In looking at this issue, I assume the franchisee is not entitled to double recovery on this account.

[126] It seems to me, the plaintiffs have suffered no additional losses over and above the compensation I have already found due to them under the general rescission provisions of the *Act.* I would award no additional damages for misrepresentation.

[127] This leaves the question of whether the plaintiffs are entitled to punitive damages, or damages for breach of the duty of good faith.

[128] In many respects, this case is factually similar to *Salah v. Timothy's Coffees of the World Inc.*[10] There, the court found the franchisor's actions in actively seeking to the keep the franchisee in the dark about the status of lease renewal amounted to bad faith. It awarded $50,000 in damages for bad faith and mental distress.

[129] Here, Country Style's actions in both keeping critical lease information from the Siriannis while actively leading them to believe the lease had been renewed are as much a breach of the duty of good faith as the facts in *Salah.* Country Style candidly admits its actions were motivated by its desire to hedge its bets, and prevent the franchisee from walking away from the franchise and leaving Country Style with obligations on a lease, and no franchisee.

[130] Country Style urges me to conclude its actions were no more than "commercially reasonable" in the circumstances. It points out that good faith dealings must be considered in the context of commercial reasonability.[11] Country Style suggests it was doing no more than trying to assess this location in a commercially reasonable fashion. It says its "commercially driven motive" was to prevent it being left with a dark store, and an ongoing lease obligation. I am not persuaded that motivation takes Country Style's actions out of the realm of failing to deal in good faith. I consider the whole issue of good faith dealing in the overarching context of the rights and obligations the *Arthur Wishart Act* mandates. Its focus is providing franchisees with disclosure that will allow them to make informed financial and business decisions. Here, Country Style favoured its own business needs at the expense of those other obligations. That is not acting in good faith.

[131] I therefore conclude Country Style breached its good faith obligations, and the franchisee is entitled to some damages. Country Style's conduct is not as egregious as in some other cases. There is no claim here for additional damages for mental suffering. When I consider the conduct as a whole, against the range of damages awarded in other cases, I conclude an award of $25,000 is appropriate here.

The counterclaim

[132] The Siriannis have never denied they owe the amount Country Style claims. They guaranteed 1159607's obligations both as franchisee and sub-lessee.

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[10] [2009] O.J. No. 4444 (S.C.J.) affirmed [2010] O.J. No. 4336 (O.C.A.)

[11] The *Act* in section 3(1) imposes a duty of fair dealing on franchisees and franchisors. In section 3(3) the *Act* provides "the duty of fair dealing includes the duty to act in good faith and in accordance with reasonable commercial standards."

Initially, they said they would pay out the proceeds of sale of the franchise when they sold the store. Now they simply seek setoff.

[133] The Siriannis owe Country Style $48,824.74 on their guarantees, together with applicable interest. Country Style may set off the amount they are owed against the amount of the plaintiffs' judgment against it.

Decision:

[134] Judgment will therefore issue in the following terms:

a) The plaintiffs will have judgment in the amount of $187,730.05 plus pre-judgment interest for damages;

b) The plaintiffs will have judgment in the amount of $25,000 plus pre-judgment interest for damages for the defendants' breach of their duty of good faith dealing;

c) The defendants will have judgment against Joseph and Eugene Sirianni on their guarantees in the sum of $48,824.74 plus pre-judgment interest;

d) The amounts set out in paragraphs (a) (b) and (c) above may be set off against one another.

[135] If the parties cannot agree on the issue of costs, they will make brief written submissions to me. The plaintiffs' will be delivered within two weeks of the release of these reasons, with the defendants' to follow within two weeks of that date. Submissions will include particulars of each lawyer's year of call, actual billing rate to his client, a costs outline, and particulars of any rule 49 offers that might bear on the issue of costs.

MESBUR J.

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