IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Buckley Industrial Consulting Inc. v. Nurse Next Door Home Healthcare Services, Canada Inc.,* 2024 BCSC 1732

Date: 20240918
Docket: S235798
Registry: Vancouver

Between:

Buckley Industrial Consulting Inc. and 1256479 B.C. Ltd.

Plaintiffs

And

Nurse Next Door Home Healthcare Services, Canada Inc.

Defendant

Before: The Honourable Mr. Justice Coval

Reasons for Judgment

Counsel for the Plaintiffs:	A.M. Beddoes J.M. Wiebe
Counsel for the Defendant:	A. Ship M. Ahmadi
Place and Date of Hearing:	Vancouver, B.C. July 19, 2024
Place and Date of Judgment:	Vancouver, B.C. September 18, 2024

Introduction

[1] The defendant ("NND") applies to dissolve the interlocutory injunction granted to the plaintiffs by consent on December 15, 2023. The injunction restrains NND from granting franchise rights in six locations, pending the trial of whether NND validly terminated the plaintiffs as its franchisee.

[2] NND submits that it agreed to the injunction based on the condition that the trial would commence July 2, 2024. It submits that, due to the plaintiffs' recalcitrance, the trial date was lost and is now postponed until at least late 2025. As a result, it is in the interests of justice to dissolve the injunction and limit the plaintiffs to their damages claims.

[3] The plaintiffs acknowledge some responsibility for the trial date being lost. They submit, however, that the dissolution of an interlocutory injunction is an extraordinary measure, which should not be granted just because of a change in circumstances. They say that the ultimate length of these proceeding was always uncertain, and the loss of their franchise rights before a trial on the merits is the sort of irreparable harm that justifies an interlocutory injunction.

[4] In my view, it is in the interests of justice to dissolve the injunction. The early trial on which the consent injunction was based was lost due to the plaintiffs' unjustified delays. This contravened deadlines agreed to by the parties and ordered by the court. Extending the injunction to a trial date in late 2025 inflicts serious harm on NND's business. The plaintiffs' franchises have already been closed for over a year, and will have been closed for over two years by the time of trial. Thus, loss of the injunction does not inflict the same type of harms as closure of an operating business. There has also been a complete breakdown in the parties' trust and confidence such that an ongoing productive franchise relationship appears unachievable. Finally, from a broader perspective, continuing the injunction in these circumstances would discourage defendants from agreeing to similar arrangements in the future, which are beneficial in that they allow litigants to avoid the cost and

effort of a high-stakes interlocutory application, craft a standstill they can live with, and save judicial resources.

Parties

[5] NND is a BC company. It operates a franchise system across Canada, providing home care and institutional staffing care services to public and private clients.

[6] The plaintiffs (“Buckley”) are also BC companies. Their principal is Mr. Vince Sara who, with his wife Ms. Amy Ghuman, has been in the healthcare business since 2016.

[7] In August 2020, Mr. Sara incorporated 1256479 B.C. Ltd. (“125”) and caused it to purchase Buckley Industrial Consulting Inc., which held the exclusive NND franchisee rights in Delta. Over the next nine months, Mr. Sara had Buckley enter into exclusive franchise agreements with NND for Richmond, North and South Surrey, North and West Vancouver, and Chilliwack/Cranbrook.

Consent Injunction

[8] The consent injunction, dated December 15, 2023, enjoined NND from granting franchise rights to third parties in six specified territories, previously franchised to Buckley, pending the trial scheduled for July 2024.

[9] For present purposes, its relevant terms were:

> THIS COURT ORDERS that:
>
> 1. BY CONSENT, and subject to Paragraphs 2-6 of this Order, the Defendant, Nurse Next Door Home Healthcare Services, Canada lnc. ("NND"), shall not, pending further Order of this Honourable Court, sell, transfer or otherwise grant to any other person the right to operate as a NND franchisee in any of the Territories (as defined in Schedule A hereto).
> 2. The Plaintiffs shall and hereby undertake to pay to NND all damages that NND suffers or incurs as a result of NND complying with Paragraph 1 of this Order.
>
> …

> 4. The Combined Trial shall be set on an expedited basis, scheduled for between 9 and 10 days, to commence on July 2, 2024, or as soon after that as the Court's availability permits, unless agreed to otherwise by all counsel.
>
> [Emphasis added.]

[10] Schedule A identified the territories of Delta, Richmond, North and South Surrey and North and West Vancouver ("Territories"). The plaintiffs relinquished their franchisee rights in the remaining two regions of Chilliwack and Cranbrook.

[11] Counsel explained during the hearing that the July 2, 2024 trial date had been approved by Supreme Court Scheduling prior to the order being made.

[12] The evidence of NND's vice-president of global franchise development is that:

> NND was willing to consent to an interim injunction on the condition that this would be finally addressed by the Court in an expedited and efficient manner… We understood an expedited trial process to mean that the parties and their lawyers would work in good faith and reasonably to meet all steps required for a quick and speedy trial.

Background Facts

[13] In 2016, Mr. Sara and Ms. Ghuman began operating medical clinics, primarily serving recent immigrants to Canada including refugees and asylum seekers. They soon recognized that many of their patients needed in-home nursing and care services. Ms. Ghuman therefore began a new business through her company Argyle Home Health Care 4 All Inc ("Argyle").

[14] As explained below, one of the disputes between the parties is whether the relationship between Buckley and Argyle breached the non-competition terms in the franchise agreements. In that regard, Mr. Sara's evidence is that Ms. Ghuman had no involvement in Buckley; and he had none in Argyle as Ms. Ghuman was its sole shareholder, director, and directing mind.

[15] In the summer of 2020, NND contacted Mr. Sara about a franchise opportunity to purchase Buckley, which was its franchisee in Delta. Mr. Sara decided to take up the opportunity and incorporated 125 to purchase the business.

[16] Over the next nine months, Buckley entered into franchise agreements with NND as its exclusive franchisee in all eight regions. Mr. Sara's evidence is that he invested approximately $815,000 in these businesses.

Franchise Agreements

[17] The eight franchise agreements contain similar terms. They are complex and run over 50 pages each. Some of the key terms involved in the parties' disputes are:

a) Minimum performance requirements, in terms of gross sales and quality of performance metrics, which must be met as a condition of the franchisee's right to operate;

b) Mandatory, highly detailed duties and obligations for franchisee operations, all in accordance with NND's formats, procedures, manuals, etc.;

c) Mandatory bookkeeping, accounting and record-keeping conforming to NND's requirements;

d) Mandatory training and ongoing operating assistance from NND;

e) Restrictive covenants, prohibiting a franchisee or its principal engaging in a similar or competitive business; and

f) NND's termination rights for defaults, with no cure period for 20 specified types of default, and cure periods of between five and 30 days for certain other defaults.

Relationship Breakdown

[18] By notices of default dated July 1, 2022, NND alleged all eight franchises had breached the requisite contractual performance standards over the previous three months. This was followed by notices of termination, dated June 1, 2023, based on "well below average" performance and over 20 operational complaints.

[19] Buckley resisted the terminations, and the parties reached a written settlement agreement of June 16, 2023. They agreed Buckley could continue operating the Surrey and Delta locations, but would sell the others on specified terms and timelines. NND held its terminations in abeyance pending these sales.

[20] In July 2023, NND notified Buckley that it had learned of Ms. Ghuman's operation of Argyle, which it deemed a further breach of the franchise agreements. Buckley responded that Mr. Sara was not involved in Argyle, as it was owned and operated only by Ms. Ghuman. NND rejected this explanation and issued a second round of termination notices. NND removed Buckley from its system and Buckley has not operated any of the franchise businesses since.

Proceedings

[21] On August 9, 2023, NND commenced an action against Buckley for damages for alleged breach of the franchise agreements.

[22] On August 18, 2023, the plaintiffs commenced this action seeking interlocutory and permanent injunctions restraining NND from terminating the franchise agreements and damages for breach of the franchise agreements and the settlement agreement. The trials of the two actions are being heard together.

[23] From September to December, both sides prepared for Buckley's injunction application and discussed potential resolutions. On December 15, they agreed to the consent injunction.

[24] Later in December, they agreed to a schedule for preparation for the July 2024 trial, which included:

- February 7, completion of document production;
- April 5, completion of examinations for discovery;
- May 17, delivery of expert reports, with responding reports by June 14; and
- May 15-30, trial management conference.

[25] In a case planning order of February 12, 2024, the parties incorporated some of these dates into a consent order, and extended the examination for discovery dates to April 5, 2024.

[26] The uncontested evidence is that trial preparation stalled from late February to mid-April 2024, while Buckley's prior counsel attempted to withdraw from the case. The documentary evidence is clear that Mr. Sara avoided dealing with the situation, to the extent of evading service so that his prior lawyers had to obtain an order for substitutional service.

[27] As a result of this delay, the deadlines in the December timetable and February case plan order fell through. By May, Buckley had produced few of its documents and examinations for discovery had not occurred.

[28] NND filed a document production application, which was ultimately resolved by a consent order of May 13, 2024. The order set out extensive categories of document production required from Buckley, Mr. Sara, Ms. Ghuman and Argyle. It required them to produce most categories of documents by May 24, 2024. Buckley and Argyle's key financial documents – including financial statements, tax documents, and general ledgers – were to be produced by June 7. It also required an affidavit of documents from Mr. Sara and Ms. Ghuman and awarded NND costs of the application in any event of the cause.

[29] By the time of this hearing, the non-financial documents had been produced and were being reviewed by NND's counsel, but the financial documents remained outstanding contrary to the May 13, 2024 order. Examinations for discovery were not yet scheduled.

[30] Because the case was not ready for trial, neither side filed a trial brief in advance of the July 2, 2024 trial date, and so the date was lost.

Merits

[31] The trial will involve numerous disputes about the parties' respective performance of their obligations under the franchise agreements.

[32] NND's main arguments on the merits include that:

a) Buckley's performance fell well below the contractual minimums for client service, employee satisfaction, and sales. The evidence of NND's vice-president of global franchise development is that Buckley's performance is "among the worst" he has seen in his 17 years with NND. He deposes that, by June 2023, the relationship was broken due to Buckley's "extremely poor performance, breach of agreed minimum sales, unresponsiveness to communications of both an operational and strategic nature, and unwillingness to work cooperatively".

b) The injunction has caused harm to NND's brand presence, reputation and goodwill, not only in the Territories but across the Province. Without dedicated franchisees operating in the Territories, NND is losing market share to competing businesses.

c) There is evidence of Mr. Sara's involvement in NND and Argyle's provision of the same services to the same type of clients. Buckley is therefore using their relationship with NND to assist Argyle wrongfully compete against it.

[33] Buckley's main arguments include that:

a) NND's July 2022 termination was invalid because it provided no opportunity to cure the alleged defaults and no details of the alleged performance breaches or customer complaints.

b) NND's July 2023 termination was invalid because there was no breach of the restrictive covenant and, once again, no opportunity to cure. Ms. Ghuman had no involvement in Buckley and Mr. Sara had none in Argyle. Furthermore, Mr. Sara deposes that he advised NND from the outset that he and his wife owned healthcare businesses that employed nurses, and that this might be a benefit to NND if he became a franchisee.

c) NND's July 2023 termination notices repudiated the parties' settlement agreement by relying on grounds that had been withdrawn. A further repudiation was the wrongful denial of Buckley's access to NND's systems contrary to the terms of the settlement agreement.

Governing Law

[34] Dissolution of an injunction has been described as an "extraordinary measure". It should not be open to parties to re-argue the issues simply on the basis of some new evidence, change in circumstances, or refined analysis (*Abbotsford (City) v. Shantz*, 2014 BCSC 2385, paras. 24-31).

[35] The parties agreed that the relevant factors when deciding whether to dissolve a consent interlocutory injunction are: (a) inordinate delay in advancing the claim; (b) harm to the defendant; (c) balance of convenience; and (d) substantial change in circumstances such that the underpinnings of the original order no longer apply. (See: *Les equipements de ferme Curran Ltee/Curran Farm Equipment Ltd. v. John Deere Limited*, 2011 ONSC 3791, para. 21; see also *Abbotsford (City)*, para. 25; *Victoria Shipyards Co. Ltd. v. Lockheed Martin Canada Inc*., 2023 BCSC 471, para. 23.)

[36] The beneficiary of an injunction carries a heavy onus to bring the underlying action to trial expeditiously. Failure to move to trial promptly can be a basis to dissolve the injunction, particularly when an expedited trial is a term of the injunction order. In such circumstances, "the best means for justice to be achieved is a timely trial on the merits" (*Abbotsford (City)*, paras. 29-30).

Positions

[37] NND says the plaintiffs acted in bad faith in failing to prepare the case for the July 2, 2024 trial date, which was an essential aspect of the consent injunction. In support of this, they point to Buckley's: (a) four changes of counsel in 10 months; (b) lack of good faith efforts to prepare the case for trial after obtaining the injunction; and, (c) breach of the scheduling agreements and orders.

[38] NND submits that the ongoing injunction is damaging to its business in ways that cannot be compensated for in damages. NND is in the business of operating a franchise system, not of operating the care-service businesses themselves. Thus, all NND has been able to do in the Territories is service former clients and answer intake calls that happen to come in. NND's evidence is that it urgently requires new franchisees to rehabilitate and grow these regions, so they are not permanently captured by competing businesses.

[39] Finally, NND submits that reinstating Buckley is unrealistic given the total breakdown in the parties' relationship. In addition to their vice-president's evidence

on that issue mentioned above in para. 32, they point to Mr. Sara's own evidence that he does "not trust" NND's regional director of franchisee performance.

[40] Buckley argues that that dissolution of the injunction would deprive it of the key remedy it seeks, without a trial on the merits. It also submits that the end-date of the interlocutory injunction was always indeterminate. Even if the parties were ready in July 2024, the trial might not have gone ahead or not completed within 10 days. Further delays would have arisen awaiting the decision and potentially also from an appeal.

[41] Buckley denies NND is being harmed by the injunction, pointing to the fact that it was operating most of the businesses in the Territories before the franchise rights were given to Buckley.

Analysis

[42] In my view, NND has satisfied the high burden of demonstrating that the consent injunction should be dissolved.

[43] Starting with the first and fourth considerations from *John Deere*, Buckley has inordinately delayed in advancing its claim. As a result, one of the underpinnings of the consent order was lost – namely, an expedited trial in July 2024.

[44] In my view, Buckley breached the fundamental bargain struck by the consent order by failing to make reasonable best efforts to prepare the case for the contemplated trial date. Indeed, the evidence suggests that, once the injunction was obtained in December 2023, Buckley made little effort to prepare the case for trial until May. As a result, the trial date has been postponed until at least October 2025.

[45] Buckley offers no explanation for its delays, including the apparent refusal to communicate with its lawyers for six weeks while document production and discoveries were supposed to occur. It also breached trial preparation deadlines that were agreed to with NND and ordered by the court.

[46] Regarding the second factor from *John Deere*, I accept NND's evidence of harm from being unable to re-franchise the Territories since July 2023 when Buckley first advised it would seek an injunction. I accept NND's evidence that its business model is focussed on franchising and the only location it intends to operate long-term is its "legacy location" in Vancouver. I accept its evidence that, before Buckley took over as franchisee, NND was operating North and West Vancouver and Richmond only on a stopgap, temporary basis. For North and South Surrey, although an affiliate had operated these franchises in the past, NND had decided to halt this when they were taken over by Buckley.

[47] I also accept NND's evidence that all it is able to do in the Territories is a stopgap approach of servicing clients who happen to contact its service centre. I therefore also accept that, if the injunction is not dissolved, the harm to NND's reputation, goodwill, and market share in these regions will continue to grow.

[48] Finally, on the third factor, the balance of convenience also supports dissolution of the injunction. The parties' business relationship is broken. A properly functioning franchise relationship typically requires trust and cooperation. The franchisee uses the franchisor's branding and confidential intellectual property. As mentioned above, the NND franchise agreements contain specific minimum performance standards. They require the franchisee to use NND's prescribed accounting methods and pay NND a share of gross sales. The franchisee must use NND's systems, formats and procedures, accept mandatory training, and purchase any specific equipment and supplies required by NND.

[49] A further important point on the balance of convenience is that the injunction is not protecting Buckley from being put out of business pending trial, but rather its potential right to re-open after trial. By the time of trial, it will have been out of business for over two years. In those circumstances, the injunction is not protecting the cash-flow, relationships and goodwill of an operating business, and damages for loss of its franchises seems an adequate and appropriate remedy, and one which

can be quantified (*One Touch Wireless Ltd. v. Bell Mobility Inc.*, 2019 BCSC 813, para. 52).

[50] A final point supporting dissolution is that the interests of justice are served by enabling parties to reach agreements such as this consent order. It saves them the effort and expense of a high-stakes injunction application, imposes a temporary standstill both can live with, and saves judicial resources. In my view, continuing the injunction in the circumstances of this case would discourage defendants from agreeing to such arrangements in the future because of a plaintiff's ability to extend the injunction by delay.

Conclusion

[51] NND's application to dissolve the injunction is granted.

[52] Subject to the parties wishing to make submissions on costs, NND is granted its costs of this application in the cause.

"Coval J."