

Court orders \$350,000 punitive damages against franchisor

By John Jaffey
Toronto

An Ontario Superior Court judge cited a franchisor's "fraud," "high-handed conduct" and "arrogant abuse of its contractual powers" as the basis for a large damage award to the owners of a mom-and-pop franchise operation.

In awarding \$350,000 in punitive damages on top of a \$225,000 judgment, Justice Victor Paisley said commercial activities "cannot be conducted like piracy on the high seas. It is not 'victory to the strong' and 'push off' to the weak. The court will not countenance such conduct and will provide an appropriate remedy."

Citing the franchisor's "obstructionist tactics, which should not be found in litigation in this province in this day in this court," he added: "The corporate veil is not a suit of armour to protect people who are guilty of crime or improper or wrongful conduct."

After making a down payment and a substantial deposit on the purchase of a pizza and chicken wing franchise, Jaffer Jan, his wife Jennifer and daughter Saira waited almost a year before taking possession on December 20, 1998. The delays were unexplained, and the newly constructed premises were supplied with defective and used equipment.

As for rents, the Jans had been promised four rent-free months, but almost three had been used up before they took possession. In addition, they had paid both first and last months in advance.

However, in March 1999, franchisor Triple 3 Holdings Inc., operating as 3 for 1 Pizza & Wings (Canada) Inc. (3 for 1), began harassing the Jans for non-existent rent arrears, relying on documents from the head lessor (not a party to the action) that showed rents owing from August 1998 to January 1999.

In the face of threats that they would be locked out of their franchise, the Jans paid an additional

\$6,317.

Justice Paisley found that the charges set out in the statements from the head lessor were not valid. He pointed out that the statements did not evidence any rent payments made by the franchisees to the franchisor, nor did they show that the franchisor had ever paid the head lessor.

Nonetheless, 3 for 1 sent a bailiff to lock out the Jans. They then tried to sell the franchise but 3 for 1 refused to consent to the sale. Instead, it found its own purchaser and resold the franchise for \$140,000. Although the franchise agreement provided for a credit to the franchisee in the case of a sale,

3 for 1 kept the entire sale proceeds.

Before the sale took place, the Jans had commenced an application for relief from forfeiture. The franchisor closed their sale in spite of it.

Then 3 for 1 brought an action against the Jans for recovery of rent arrears, relegating them to the position of plaintiffs by counterclaim.

Justice Paisley applied the list of factors in *Whiten v. Pilot Insurance Co.*, [2002] 1 S.C.R. 595, to the facts before him. They fit like a glove. For example, the Jans were vulnerable, and 3 for 1's conduct was planned and deliberate, with a profit motive.

Gregory Sidlofsky of Kramer Henderson acted for the franchisees. He told *The Lawyers Weekly* his clients are "felt a great deal of relief and vindication for what they endured in their dealings with 3 for 1."

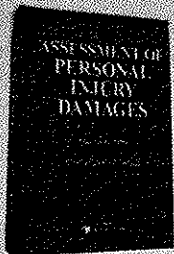
"As Justice Paisley commented the discovery process in this case was shocking and abusive. The lawyer for 3 for 1 examined the Jans for 10 days. We had to bring several motions to strike out their pleadings in order to compel 3 for 1 to abide by court orders. There were two adjournments of fixed trial dates attributable to 3 for 1 and they tried unsuccessfully to adjourn the third trial date.

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arguing the third trial case.

"The 3 for 1 companies are the plaintiffs in the action but they did not initiate the proceedings. The Jans commenced the proceedings by bringing an application to compel 3 for 1 to consent to an assignment of the franchise."

He said 3 for 1 refused to consent, alleged breaches of the franchise agreement and locked the Jans out while the hearing date in the application was pending.

"The Jans then brought a second application for relief from forfeiture. While the hearing date in the second application was pending, 3 for 1 transferred the franchise to a new purchaser and pocketed \$140,000 in the process. During the cross-examinations in the applications, 3 for 1 served their claim. In the applications and in the claim, 3 for 1 made numerous unfounded allegations against the Jans, the most serious of which were not even pursued by 3 for 1 at trial," he said.

"I assume that 3 for 1 commenced the action to try to gain a procedural advantage in the litigation or to just put additional pressure on my clients. However, it likely backfired at trial as they were forced to put forward their case first, without any support for their allegations. The Jans certainly would have commenced the action if 3 for 1 had not, as the relief requested in the applications became moot as a result of 3 for 1's conduct.

Reasons in *Triple 3 Holdings Inc. v. Jan*, [2004] O.J. NO. 2749, are available from FULL TEXT, approx. 30 pp.