# IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Latifi v. The TDL Group Corp.,*
2024 BCSC 832

Date: 20240515
Docket: S198150
Registry: Vancouver

Between:

**Samir Latifi**

Plaintiff

And

**The TDL Group Corp.**

Defendant

Before: The Honourable Madam Justice Sharma

## Reasons for Judgment

| | |
|---|---|
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| Place and Date of Trial/Hearing: | Vancouver, B.C.<br>May 29–31, 2023<br>June 1–2, 2023<br>February 2, 2024 |
| Place and Date of Judgment: | Vancouver, B.C.<br>May 15, 2024 |

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## I. INTRODUCTION

[1] This judgment addresses two applications, which were heard together. The plaintiff seeks certification of a class action, and the defendant seeks to have the action summarily dismissed.

[2] The plaintiff, who was employed at a Tim Hortons restaurant, seeks to certify a class of “all persons who are or were employees at a Tim Hortons restaurant in Canada”. The defendant in this action is the corporate body that owns Tim Hortons, and is the franchisor for Tim Hortons restaurants in Canada.

[3] The action concerns a “no hire” or “no poach” clause contained in the license agreement governing Tim Hortons restaurants operated by franchisees (the “License Agreement”). The clause prevents franchisees from employing or seeking to employ anyone from another Tim Hortons franchise without the written approval of the defendant.

[4] The original claim sought a number of orders that the impugned clause violated the *Competition Act*, R.S.C. 1985, c. C-34, but in judgment issued in November 2021, most of those claims were struck: *Latifi v. TDL Group Corp.,* 2021 BCSC 2183 [*2021 RFJ*]. What remains is the aspect of the claim of civil conspiracy based on paramount purpose, and the tort of unlawful means insofar as it corresponds to the claim of paramount purpose civil conspiracy (*2021 RFJ* at para. 129).

[5] There is no dispute that in this case, the unlawful means tort claim will fail if predominant purpose conspiracy claim fails. That is because the conduct said to comprise the alleged "unlawful means" in this case is the same conduct alleged to constitute the predominant purpose conspiracy. Without the existence of the alleged predominant purpose conspiracy, there is no "unlawful means" to give rise to a tort.

[6] In addition, if summary judgment is granted, the court need not consider the plaintiff's certification application: *Pantusa v. Parkland Fuel Corporation*, 2022 BCSC

322 at paras. 5–6, 136; *Dussiaume v. Sandoz Canada Inc*., 2023 BCSC 795 at para. 121.

[7] For the reasons explained in this judgment, I am persuaded that there are no genuine issues for trial in this action, and therefore summary judgment is appropriate.



## II. FACTS

[8] The following facts extracted from *2021 RFJ* are relevant to the two applications. I adopt in this judgment the same definitions identified below.

> [4] The defendant, The TDL Group Corp. ("TDL"), owns the Tim Hortons brand, and is the franchisor for Tim Hortons restaurants in Canada. TDL also operates corporate Tim Hortons restaurants. Collectively, the corporate restaurants and franchisees employ thousands of employees throughout Canada. For convenience, I will use "Tim Hortons" to mean both TDL's corporate restaurants and franchisees' restaurants.
>
> [5] The plaintiff, Mr. Latifi, was employed at a Tim Hortons in Surrey, British Columbia in 2012. He did not work at any other location. He brings the claim on behalf of all Tim Hortons' employees in Canada, who are the proposed class members (for convenience, I will refer to these [as] Class Members).
>
> [6] At issue is a specific clause that exists in the standard Tim Hortons franchise agreements (the "No-hire clause"). Pursuant to that clause, franchisees agree:
>
> > not to employ or seek to employ any person who is at the time employed by [TDL] or by any other licensee of the [TDL] operating the same or similar business, or otherwise directly or indirectly to induce such person to leave his or her employment thereat without the prior written consent of the [TDL].
>
> …
>
> [8] The plaintiff also alleges TDL, in insisting and enforcing the No-hire clause, has committed civil conspiracy and/or the tort of unlawful means for which either an accounting and restitution, or disgorgement of benefits, should be ordered.

[9] The relevant portions from the amended statement of claim was summarized in *2021 RFJ* at para. 12:

> [12] The plaintiff claims the No-hire clause harms Class Members by suppressing their wages, which benefits Tim Hortons' bottom-line. The plaintiff asserts that among others, the following facts support his claim:
>
> > a) TDL's franchisees operate pursuant to standard, non-negotiable franchise agreements they must enter with TDL.

b) In addition to the No-hire clause, the standard franchise agreements require franchisees to agree that TDL has a unilateral right to terminate the agreements for default, including violation of the No-hire clause.

c) Each franchise is independently owned and operated businesses, and therefore are direct competitors of one another.

d) Because TDL also owns some corporate restaurants, it is also a direct competitor of its franchisees.

e) Tim Hortons restaurants are in direct competition amongst themselves for hourly-wage labour.

f) TDL implemented the No-hire clause deliberately “in order to suppress employees’ wages” and to increase the profits for it and its franchisees at the expense of its employees.

g) The No-hire clause provides no benefit to the public nor the plaintiff and Class Members.

h) As a direct result of TDL’s actions, the plaintiff and Class Members have suffered reduced wages, reduced employment benefits, loss of professional growth opportunities, and worsened working conditions.

### A. Evidence about Potential Class Representatives and Class Size

[10] The plaintiff filed an affidavit dated April 1, 2022. He brings this claim on behalf of himself and any other person who is or was employed at Tim Hortons restaurants in Canada. The plaintiff also relies on affidavits from two other individuals: Brooke White and Jovendeep Grewal. All three deposed that they are willing to act as a representative plaintiff if the matter is certified, and that they are aware of the duties of a representative.

[11] Mr. Latifi worked at a Tim Hortons restaurant from May 2012 to September 2012 in Surrey, British Columbia. His typical shift was the “graveyard” shift, from 1 a.m. to 7 a.m. While he worked at Tim Hortons, he also worked part time at A&W where his typical shift was from 4 p.m. to 8 p.m. He has no knowledge of how many people are in the proposed class.

[12] Ms. White worked at a Tim Hortons restaurant in Kelowna from November 2017 until December 2020. She had a variety of roles and had supervisory duties. She was unaware of the No-hire clause until she saw it on the plaintiff’s lawyer's website.

[13] Ms. Grewal worked at Tim Hortons in Coquitlam, British Columbia, from June 2014 to August 2017. In 2016, she applied to work at another Tim Hortons restaurant in Maple Ridge. She had an interview with the supervisor, but she did not get hired. There is no evidence as to why she was not hired. She was unaware of the No-hire clause during her employment at Tim Hortons. She became aware of this litigation through her sister, who works at the plaintiff's lawyer's law firm as a legal assistant.

[14] The plaintiff also relies on an affidavit from Eduardo Tanjuatco, a legal assistant. He has no knowledge of the size of the proposed class, but as of the date he made the affidavit (April 27, 2022), 82 people had contacted the plaintiff's lawyer's firm, expressing an interest in participating in the proposed class action.

### B. Operation of Tim Hortons Restaurants

[15] With regard to the defendant's operations, the defendant relies on affidavits made by James Gregoire, who is TDL's vice president, franchise operations; and Bruce Knudsen who is TDL's area franchise lead covering the majority of British Columbia.

[16] As vice president for franchise operations, Mr. Gregoire is responsible for managing TDL's relationship with franchisees and overseeing operations of franchisee restaurants across Canada. In that role, he communicates with franchisees regarding the application and enforcement of the License Agreement.

[17] Mr. Gregoire has been employed by TDL for almost 12 years and worked in a variety of roles, all of which relate to the operation of Tim Hortons restaurants and management of the franchisees. Since 2013, a core part of his job duties pertained to franchising, including approving new franchisees and entering into licenses with them. In particular, he served as district manager, overseeing regional operations of restaurants; manager of business development; director of business development and training; general manager of operations of restaurants in Québec and Atlantic Canada; and, head of field operations responsible for overseeing restaurant operations across Canada.

[18] Mr. Knudsen has been employed by TDL for nearly 30 years. In his current role, he is responsible for managing the relationships between the defendant and Tim Hortons franchisees for the vast majority of British Columbia. Among other things, it is his responsibility to communicate to franchisees regarding their License Agreement.

### *1. Franchisees and the License Agreement*

[19] There are about 4,000 Tim Hortons restaurants across Canada. While almost all restaurants are owned and operated by third parties, TDL does directly own and operate a few restaurants. The License Agreement does not require franchisees to report the number of employees they hire, so TDL has no knowledge and did not estimate how many people are or have been employed at Tim Hortons restaurants.

[20] All franchisees are required to enter into the License Agreement with TDL in order to be able to use the Tim Hortons brand and participate in the franchise system. Among the terms stipulated in that agreement are the type of restaurant to be operated, royalty fees, renewal terms, and operating standards. However, franchisees maintain sole authority and control over their employees because they are solely responsible for all training and decisions relating to hiring, dismissal, promotion, demotion, transfer, and layoff of employees.

[21] The License Agreement requires franchisees to maintain a sufficient number of trained employees in a manner consistent with stipulated standards. Those standards are set out in the agreement or an accompanying operating manual, and include, among other things, standards relating to speed of service. Required training varies by role, but TDL submits that all training requires what it believes a substantial investment of time and resources, particularly for managerial staff. Mr. Gregoire deposed that maintaining access to a trained pool of employees is critical for a franchisee to adequately operate a restaurant pursuant to the terms of the agreement.

[22] Mr. Gregoire deposed that since at least 2003, some form of the No-hire clause has been included in the License Agreement. As of August 2018, the wording of that clause was as follows:

> The Licensee covenants and for the duration of this Agreement and any renewal hereof, except as otherwise approved in writing by the Licensor, … not to employ or seek to employ any person who is at that time employed by the Licensor or by any other licensee of the Licensor operating the same or any other business, or otherwise directly or indirectly to induce such person to leave his or her employment.
>
> [Emphasis added.]

[23] However, as of September 11, 2018, TDL informed franchisees that it would no longer enforce the No-hire clause in existing agreements. He also stated that TDL had not enforced the clause since that time, nor was it included in any new franchisees since then.

[24] Both Mr. Gregoire and Mr. Knudson deposed that in their personal experience, when enforced, the No-hire clause was enforced in a discretionary manner by TDL. Both state that complaints from franchisees about attempts by other franchisees to solicit employees arose “extremely rarely”. In those circumstances, TDL would attempt to mediate or resolve the complaints between the franchisees.

[25] Mr. Gregoire knew of a few cases where the issue arose and they were resolved by one franchisee compensating the other one for lost training costs with a cash payment. He was unaware of any instance where more serious action was taken beyond that type of payment or fine. Furthermore, he was unaware and did not believe that any franchisee was ever terminated as a result of a violation of the No-hire clause.

### *2. Purpose of the No-hire Clause*

[26] Mr. Gregoire’s affidavit speaks to the purpose of the License Agreement and specifically the No-hire clause. The overriding purpose of the License Agreement is to earn a profit and provide value to TDL’s parent entities and their shareholders. He

deposed that the primary purpose of the No-hire clause was to benefit franchisees and their businesses, which, in turn, would be beneficial to TDL's business.

[27] In Mr. Gregoire's view, Tim Hortons restaurants operate not only in a highly competitive market for customers, but also for employees. Employees have a large number of options to work in a quick service restaurant environment such as McDonald's, Burger King, A&W, Subway, and others. TDL's competitors frequently operate in close physical proximity to Tim Hortons restaurants. Because of that, he stated it could often be a significant challenge for franchisees to maintain trained staff to adequately operate their business. He stated that the No-hire clause served the interests of the franchisees by giving them assurances that after spending time and resources to train an employee, that employee could not immediately be solicited away by another Tim Hortons franchisee, at least not without TDL's approval.

[28] Mr. Gregoire denied that the purpose of the clause was to injure employees by limiting employment generally or to reduce or suppress wages. As noted, franchisees must compete with other potential employers for their labour, and the No-hire clause did not, and could not, preclude other businesses from trying to solicit employees away with higher wages or better conditions.

### C. Expert Evidence

[29] The plaintiff relies on the evidence of Rafael Gomez, an economist and professor at the University of Toronto, where he is also the director of the Centre for Industrial Relations and Human Resources. Mr. Gomez's main field of study is industrial/employment relations with a focus on labour market policy.

[30] He completed three expert reports dated December 17, 2020, February 19, 2022, and December 14, 2022.

[31] His first report ("Measuring the Effect of No Hire Clauses Within Tim Horton's Franchise Agreements") was prepared before *2021 RFJ* was issued, meaning it was

prepared to support certification when the case was primarily one relating to alleged violations of the *Competition Act*.

[32] In his first report, Mr. Gomez noted that the labour market in Canada and the United States has been marked by stagnating real earnings for the past 40 years for everyone except the highest paid workers. He opined that a number of factors contributed to that, including the "rise in the use of no-hire (no poach) and similar non-compete clauses" in many industries since the 1980s, which, in his view, worsened worker mobility.

[33] His report does not distinguish between no-hire clauses and non-compete clauses, but he acknowledges that most of the studies and research upon which he relied were only examining non-compete clauses.

[34] The report does not thoroughly define no-hire clauses in relation to non-compete clauses, but in a footnote to his report, he partially explained his reasoning for essentially equating no-hire clauses with non-compete clauses:

> Traditionally, covenants not to compete were designed to prevent unfair competition and were confined to corporate executives, persons with knowledge of trade secrets, salespersons and client-based professionals (e.g., physicians and accountants). However, non-compete arrangements have recently become much more common in many other types of employment, especially in the service industry, with their reach extending to chefs, yoga instructors, fast food employees, editorial employees, phlebotomists, student interns and a wide range of low income workers with no knowledge of trade secrets and no effective ability to entice a customer to leave the former employer.

[35] Other commentary in this report includes:

a) In the fast food, quick service restaurant sector, no-hire agreements "actively seek to restrict the hiring of employees from other units within a franchise chain, thus reducing labour market competition and career advancement". This is based on studies, the majority of which, if not all, looked at the effects of these kinds of clauses based on US data. Mr. Gomez argued the same inferences are applicable to Canada because many of the same franchise organizations operate in both

countries and there is a high degree of similarity in labour market institutions between the two countries.

b) Labour economists view no-hire and non-compete clauses as anticompetitive, and a causal factor in dampening job mobility and suppressing wages. Mr. Gomez opined that the clauses distort labour market mobility patterns and increase the market power of employers. That is because the franchise chain comes to be viewed and acts as one company, resembling a monopoly. That analogy is based on the view that when a franchisor is large with many franchisees near one another and it implements a no-hire clause, those franchisees collectively turn into a single, major employer. However, in his view, the employees miss out on the benefits of working for a large employer, which Mr. Gomez explains as follows:

> But unlike a single major employer with a strong internal labour market (ILM) providing life-long training, career development and promotional opportunities, the collection of small franchise operators has no such scale or scope for internal promotion.

c) However, in terms of empirical support on the prevalence of no-hire clauses, Mr. Gomez cites only one US study from 2018, which simply noted that over 50 percent of major franchisors had no-hire agreements in their franchise contracts.

[36] His second report of February 19, 2022, was an update to his first report prepared after *RFJ 2021* was rendered. It was identical to the first report except for the addition of a discussion of literature on the possible purposes of no-hire clauses. In his review of that literature, Mr. Gomez found no-hire and non-compete clauses within franchise agreements were discouraged by labour economists.

[37] With respect to his discussion of the purpose of no-hire clauses, he refers in his second report to three studies, but all are from the US and none looked at no-hire clauses in the fast-food or hospitality industries. Two suggested a relationship between lower job mobility and the removal of a ban on non-compete clauses. The

third study found wages were lower in US states which enforced no-hire agreements. Mr. Gomez opined these negative consequences were "not accidental" or inadvertent by-products, but were implemented for the pecuniary benefit of the employer.

[38] Mr. Gomez's third report dated December 14, 2022, was prepared as a rebuttal to James Gregoire's evidence. As such, it is not clear to me it qualifies as an expert report *per se*. In any event, in it Mr. Gomez argued that no-solicitation clauses cannot be justified by the need to maintain trained staff because the challenge of maintaining trained staff is common across industries. It is not clear to me what that conclusion is based on.

[39] He also disagreed with the assertion that no-solicitation clauses serve the interests of franchisees primarily by preventing other franchisees from hiring their trained workers. He commented that if the training is generic, then the workers could find jobs at other fast food chains, meaning the no-solicitation clauses cannot be economically justified on the premise of inducing higher internal investments in firm-specific training.

## III. LEGAL PRINCIPLES

### A. Predominant Purpose Conspiracy

[40] The plaintiff must prove the following to meet the legal test for predominant purpose conspiracy:

> (i) an agreement or concerted action between two or more persons;
> (ii) with the predominant purpose of causing injury to the plaintiff; and
> (iii) overt acts committed that cause damage to the plaintiff.

(*Watson v. Bank of America Corporation*, 2015 BCCA 362 at para. 125.)

[41] As to the first step, it is well established that the plaintiff has the burden to prove an actual "agreement" amongst conspirators, and not merely knowledge or approval of the impugned conduct: *Barroqueiro v. Qualcomm Incorporated*, 2023 BCSC 1662 at para. 167. With respect to the second factor, the means used by the

defendant can be lawful or unlawful: *Cement LaFarge v. B.C. Lightweight Aggregate*, [1983] 1 S.C.R. 452 at 471, 1983 CanLII 23; *Can-Dive Services Ltd. v. Pacific Coast Energy Corp.,* 96 B.C.L.R. (2d) 156 at para. 5, 1993 CanLII 6870 (C.A.); *H.M.B. Holdings Limited v. Replay Resorts Inc*., 2019 BCSC 1138 [*H.M.B. Holdings*] at para. 41. However, where lawful means are used, "if their object is to injure the plaintiff, the lawful acts become unlawful": *Pro-Sys Consultants Ltd. v. Microsoft Corporation*, 2013 SCC 57 [*Pro-Sys*] at para. 74.

[42] Harm must be the "predominant purpose" of the concerted action or agreement, not merely an ancillary purpose or a resulting effect: *Pro-Sys* at paras. 74–75. In *Pro-Sys*, the Supreme Court of Canada noted that Justice Estey had previously described predominant purpose conspiracy as a "commercial anachronism" and stated that courts should "restrict its application" (at para. 75, quoting *Cement LaFarge* at 473).

[43] It is insufficient if the alleged harm is the result of, or collateral to, acts pursued merely or predominantly out of self-interest*: LeRoy v. TimberWest Forest Corp*., 2020 BCSC 978 at paras. 428, 475–476, aff'd 2021 BCCA 326; *Harris v. GlaxoSmithKline Inc*., 2010 ONCA 872 at para. 39, leave to appeal to SCC ref'd, 34111 (14 July 2011); *Canadian Bedding Company Ltd. v. Western Sleep Products Ltd*., 2009 BCSC 1499 at para. 146.

[44] For instance, in *Cement LaFarge,* the Supreme Court of Canada relied on *Southam Co. Ltd. v. Gouthro,* [1948] 3 D.L.R. 178, 1948 CanLII 248 (B.C.S.C.), where this Court found that an illegal strike did not have a predominant purpose to injure; rather, it was a means of attaining the workers' object despite knowing that they would injure the plaintiff. The workers held an honest conviction that they were acting in their own interests, so the civil conspiracy claim failed.

[45] In *Southam* at 184–186 *(*reproduced in *Cement LaFarge* at 471), Justice Wilson relied on *Crofter Hand Woven Harris Tweed Co. v. Veitch,* [1942] 1 ALL E.R. 142, [1942] A.C. 435 (H.L.). In that case, the House of Lords held that cloth producers did not have claims for predominant purpose conspiracy against workers

who, seeking better working conditions, persuaded dockworkers to embargo shipments. Rather, the predominant object was to benefit union members to create a better basis for collective bargaining. Therefore, despite the clear injury to the industry, the claim of civil conspiracy could not succeed.



### B. Unlawful Means Tort

[46] The unlawful means tort is available in three-party situations in which the defendant commits an unlawful act against a third party and that act intentionally causes economic harm to the claimant. The gist of the tort is the targeting of the plaintiff by the defendant through the instrumentality of unlawful acts against a third party: *A.I. Enterprises Ltd. v. Bram Enterprises Ltd.,* 2014 SCC 12 [*A.I. Enterprises*] at paras. 78, 96–97.

[47] The essential elements of this tort are:

a) an unlawful act committed against a third party;

b) the act was intended to cause economic harm to the claimant; and

c) it resulted in economic harm to the claimant.

(*Low v. Pfizer Canada Inc*., 2015 BCCA 506 at paras. 77, 80, 82; *A.I. Enterprises* at paras. 23, 26, 29, and 45.)

[48] Acts are "unlawful" if they would support a civil action for damages or compensation by the third party, or they would have supported an action had the third party suffered a loss: *A.I. Enterprises* at para. 74. In other words, there must be an actionable civil wrong of some kind against a third party other than the claimant.

[49] With respect to the requirement of the intention to cause harm, something more than mere foreseeability of the harm is required: *A.I. Enterprises* at para. 97. The core levels of intention that are sufficient to meet the requirement of the unlawful means torts are: (a) an intention to cause economic harm to the claimant as an end in itself; or (b) an intention to cause economic harm to the claimant because it is a necessary means of achieving an end that serves some ulterior motive: *A.I.*

*Enterprises* at para. 95. These types of intentions involve a tortfeasor "aiming at" or "targeting" the plaintiff.

[50] It is not sufficient that the harm to the plaintiff be an incidental consequence of the defendant's conduct, even where the defendant knows that it is extremely likely that harm to the plaintiff may result: *A.I. Enterprises* at para. 95. Such incidental economic harm is an accepted part of market competition.

### C. Summary Judgment

[51] Rule 9-6 of the *Supreme Court Civil Rules* governs summary judgment:

> (5) On hearing an application under subrule (2) or (4), the court,
>
> (a) if satisfied that there is no genuine issue for trial with respect to a claim or defence, must pronounce judgment or dismiss the claim accordingly,
>
> (b) if satisfied that the only genuine issue is the amount to which the claiming party is entitled, may order a trial of that issue or pronounce judgment with a reference or an accounting to determine the amount,
>
> (c) if satisfied that the only genuine issue is a question of law, may determine the question and pronounce judgment accordingly, and
>
> (d) may make any other order it considers will further the object of these Supreme Court Civil Rules.

[52] The bar on a motion for summary judgment is high: a defendant that seeks summary dismissal bears the evidentiary burden of showing that there is "no genuine issue of material fact requiring trial", to ensure that "claims that have no chance of success be weeded out at an early stage": *Canada (Attorney General) v. Lameman*, 2008 SCC 14 at paras. 10–11; *Drummond v. Moore*, 2012 BCSC 496 at para. 25.

[53] TDL emphasized the Supreme Court of Canada's statements encouraging the summary dismissal of claims bound to fail at an early stage in the litigation. Apart from saving the parties cost of the litigation, the proper winnowing out of claims that have no chance of success benefits the justice system as a whole: *Lameman* at para 10; *Pantusa* at para. 50. This has prompted the court to call for a "culture shift" to utilize summary procedures in order to promote efficiency in the justice system,

including that a claim will not survive simply because it is novel: *Atlantic Lottery Corp Inc. v. Babstock*, 2020 SCC 19 at paras. 18–19; *Hryniak v. Mauldin*, 2014 SCC 7 at paras. 2–3.

[54] The analysis under Rule 9-6(5)(a) focusses on whether the claim is without merit such that there is no genuine issue to be tried based on the material, including evidence.

[55] As set out in *Xiao v. Fan*, 2020 BCSC 69 at para. 46, a judge hearing a summary judgment application must examine the pleaded facts to determine what causes of action they may support, including identifying the elements of each cause of action and whether the necessary material facts have been pleaded. If insufficient material facts have been pleaded such that it is beyond a doubt that the cause of action is bound to fail, then the defendant has met its onus, and the claim must be dismissed.

[56] However, if sufficient material facts have been pleaded, the issue becomes whether the evidence adduced at the hearing is clear that there is no genuine issue for trial. A "genuine issue for trial"—sometimes referred to as a "*bona fide* triable issue"—may be one of fact or of law in the sense that a *bona fide* triable issue arises on the material before the court in the context of the applicable law.

[57] A genuine issue of fact arises from a material conflict in the evidence, although Rule 9-6 is still available where there are disputed facts in the pleadings: *McLean v. Law Society of British Columbia*, 2016 BCCA 368 at para. 36; *Lameman* at para. 11. Each party must put its “best foot forward” as to the existence or non-existence of material issues and the underlying materials facts: *Lameman* at para. 11; *McLean* at paras. 36, 38; *Pantusa* at para. 58.

[58] Accordingly, summary judgment cannot be defeated by vague references to what may be adduced in the future. Rather, it is judged on the basis of the pleadings and materials actually before the court, although the judge may make inferences of

fact based on undisputed facts strongly supporting such inference: *Lameman* at paras. 11, 19.

[59] That is why, generally speaking, the absence of discovery is not reason alone to deny summary judgment: *Xiao* at paras. 48–49; *Pantusa* at paras. 58, 91, 113, 133. The party opposing summary judgment must demonstrate there is a reasonable prospect that further discovery will reveal the existence of a triable issue: *Xiao* at paras. 48–49.

[60] In *Nextgear Capital Corporation v. Corsa Auto Gallery Ltd.,* 2019 BCSC 1667, the court rejected the argument that summary judgment could not succeed because discovery had not been completed. Justice Jackson stated that there was "no evidence, information, or even submissions made that would satisfy me that there is a likelihood that evidence will be available following the discovery process to support the [allegations] as pled": para. 40.

[61] However, where "the court is faced with oath against oath, it is most unlikely that it could grant judgment to the plaintiff or dismiss the claim": *Northwest Organics, Limited Partnership v. Maguire*, 2013 BCSC 1328 at para. 23, aff'd 2014 BCCA 454, leave to appeal ref'd by SCC, 36248 (25 June 2015); *International Taoist Church of Canada v. Ching Chung Taoist Association of Hong Kong Limited*, 2011 BCCA 149 at para. 14.

[62] This means that where the facts are contested, the court must not weigh evidence beyond determining whether it is incontrovertible. If further weighing is needed, then the "plain and obvious" or "beyond a doubt" test has not been met: *Aubichon v. Grafton,* 2022 BCCA 77 at para. 30, citing *Beach Estate v. Beach,* 2019 BCCA 277 at para. 49; *Skybridge Investments Ltd. v. Metro Motors Ltd.*, 2006 BCCA 500 at paras. 8–12; *Tran v. Le*, 2017 BCCA 222 at para. 2.

[63] Regarding questions of pure law, the defendant must show the legal issues are "'well settled by authoritative jurisprudence" making the claim bound to fail: *Haghdust v. British Columbia Lottery Corporation,* 2011 BCSC 1627 at para. 33;

leave to appeal ref'd, 2012 BCCA 120. However, where the only genuine issue is a question of law, the court has discretion to answer the question and grant judgment or dismiss the claim pursuant to Rule 9-6(5)(c).

[64] These principles were applied in *Jensen v. Samsung Electronics Co. Ltd.,* 2021 FC 1185, aff'd 2023 FCA 89, leave to appeal ref'd by SCC, 40807 (11 January 2024), where the Federal Court held that it was plain and obvious that the plaintiffs' pleadings did not disclose a cause of action based on ss. 36 and 45 (or 46) of the *Competition Act*: para. 7. Justice Gascon held that the allegations of a s. 45 conspiracy were not anchored in material facts, were speculative, and "boil[ed] down to bald assertions": para. 7. *Jensen* emphasizes that the "class action based on an alleged conspiracy ... cannot be allowed to proceed on the basis of pure speculation or wishful thinking about the existence of an agreement, and on a lack of some minimal evidence of unlawful conduct": para. 285. Although Gascon J.'s comments were made in the context of a certification application, they are helpful for assessing whether there is a genuine issue for trial on a summary judgment application.

[65] Similarly, in *Pantusa*, Justice Milman found there was no evidence to support the plaintiff's pleaded allegations of anti-competitive conspiracy based in statute or civil conspiracy (unlawful means and predominant purpose). Justice Milman held that the plaintiff's claim disclosed no genuine issue for trial and dismissed the action under Rule 9-6: paras. 91–92, 133–135.

## IV. ANALYSIS

### A. Evidentiary Issues

[66] TDL submits its evidence provides a complete answer to the plaintiff's allegations, entitling it to summary dismissal. It places particular emphasis on Mr. Gregoire's evidence about the purpose of the No-hire clause (see above paras. 26–28). However, the plaintiff objects to the admissibility of those statements.

[67] An application for summary judgment is an application for a final order. Where final orders are sought, affidavit evidence should mirror evidence a person could

give at trial, and therefore must be based on personal knowledge. Similarly, hearsay and evidence based on information and belief is generally inadmissible: *603262 B.C. Ltd. v. Eiyom Properties Ltd.*, 2014 BCSC 1153 at para. 16.

[68] The plaintiff submits Mr. Gregoire's statements about the history of the No-hire clause are inadmissible because he could not have had personal knowledge of that history given the timing of his employment and nature of his roles within TDL. The plaintiff also submits Mr. Gregoire fails to identify the source of his beliefs about that history, rendering the evidence inadmissible.

[69] TDL's position is that the plaintiff's evidentiary objections were improperly raised and, in any event, without merit.

[70] First, TDL contends that the plaintiff ought to have given notice of the evidentiary objections in his application response filed December 20, 2022. This position is based on R. 8-1(10)(b)(i) which requires a response opposing relief to "summarize the factual and legal bases on which the orders sought should not be granted".

[71] In *British Columbia v. Apotex Inc*., 2022 BCSC 1383, Justice Fitzpatrick emphasized the importance of providing notice of arguments to the other side in a notice of application (her comments are equally applicable to an application response). She quotes Justice Adair in *Dupre v. Patterson*, 2013 BCSC 1561 at para. 54, who stated that "tendering a written argument at the hearing is neither an alternative to, nor a substitute for, setting out the 'Legal Basis' in a notice of application … in accordance with what the *Rules* and the case law require" (*Apotex* at para. 16).

[72] There are two purposes for the requirement in R. 8-1(10)(b)(i) that the factual and legal basis be set out: ensure opposing parties are not caught by surprise by a party making an argument not reasonably anticipated, and to ensure parties understand the basic arguments made in order to possibly avoid court altogether (*Apotex* at para. 18).

[73] TDL relies on these principles to submit the plaintiff's evidentiary objections should be dismissed.

[74] However, TDL also submits its evidence is admissible because Mr. Gregoire's statements about the No-hire clause are based on his personal knowledge. Specifically, his affidavit does not include the typical qualification that some facts are based on "information and belief", and states only that its content is based on personal knowledge.

[75] TDL submits it first became aware of the evidentiary objections to Mr. Gregoire's evidence upon receiving the plaintiff's submissions made in response to its argument on summary judgment. Mr. Gregoire's second affidavit directly responds to those evidentiary objections. He confirmed that the source of the information in his first affidavit was his "extensive personal knowledge and experience with the Tim Hortons franchise business and license agreements through the management roles [he] held at TDL". TDL points out that if the plaintiff wanted to challenge Mr. Gregoire's assertion about the source of his knowledge, he ought to have applied for cross-examination.

[76] I do not find that Mr. Gregoire's evidence is inadmissible. Corporations speak through their representatives. Mr. Gregoire's job duties over the years clearly placed him in a position to have corporate knowledge about the License Agreement and its terms, including its history. Moreover, I have been given no reason to doubt the credibility or reliability of Mr. Gregoire's evidence. For example, there is no evidence from a franchisee that contradicts, challenges, or questions Mr. Gregoire's statements about the No-hire clause.

[77] Therefore, I accept that Mr. Gregoire has personal knowledge as to what he deposed. Accordingly, I dismiss the plaintiff's objections to the admissibility of that evidence.

[78] I add that while I agree R. 8-1(10)(b)(i) and fair notice required the plaintiff to include the evidentiary objections in his application response, it is not clear to me the hearing would have been affected in any way since Mr. Gregoire filed a second affidavit addressing the objections.

## B. Summary Judgment

[79] TDL argues the plaintiff has failed to show in its pleadings and evidence that there exists a genuine issue as to whether TDL conspired with its franchisees to harm employees by including the No-hire clause in the Licensing Agreement. Instead, TDL submits Mr. Gregoire's evidence irrefutably establishes that the No-hire clause has a valid commercial purpose.

[80] The plaintiff contends a trial is necessary to address three issues and, therefore, the defendant's application for summary judgment should be dismissed:

a) Does the tort of predominant purpose conspiracy require conspirators to injure the plaintiff merely for the sake of injuring him?

b) What evidence is required to prove the predominant purpose of a competition conspiracy causing "economic injuries"?

c) Can the No-hire clause be viewed in isolation from the franchise agreements?

### *1. The Plaintiff's Proposed Trial Issues*

#### *a. Injury Merely for the Sake of Injury*

[81] The first issue is a question of law, and I agree with TDL that the question is well settled (see discussion above at paras. 40–45). Therefore, I do not agree that a trial is required to address that issue.

#### *b. The Evidence Required for Predominant Purpose Conspiracy*

[82] I do not agree with the plaintiff's characterization of the second and third issues. These are not independent issues that justify a trial. Instead, they are merely sub-issues inherently subsumed within one of the main issues before me: is the predominant purpose of the No-hire clause to injure Tim Hortons' employees? It is on that issue that the defendant must meet the test of showing there is no genuine issue for trial. Nevertheless, I will address the second and third issues independently.

[83] The wording of the second issue does not justify a trial; it simply asks what evidence is required to prove the claim pleaded. If that could defeat an application for summary judgment, it is difficult to see how any application could succeed.

[84] The plaintiff does expand on the issue. He argues TDL's response to the claim rests on two flawed propositions: (i) the plaintiff's claim fails if harm, by itself, is not the singular goal of the conspiracy, and (ii) the plaintiff's claim fails if it is shown that conspirators benefit from the harm. The plaintiff disagrees with those propositions. He alleges that a trial is necessary to resolve the dispute.

[85] I agree with TDL that the plaintiff has not accurately described its position. TDL submits that to meet the test for establishing the conspiracy, the court must focus on the conspirator's intent, not only on the effect. The plaintiff's phrasing of the question avoids the central issue of intent to harm. TDL also contends that the plaintiff's evidence focusses almost exclusively on effects, which is a large reason why summary judgment is appropriate. I agree with both propositions.

[86] TDL submits there is no evidence of any conspiracy and, therefore, its summary judgment application should be granted.

[87] I agree there is a potentially fatal evidentiary flaw to the plaintiff's case. While harm to the claimant must be the predominant purpose of the conspiracy, an equally necessary component is the existence of a conspiracy. A conspiracy requires proof that the conspiring parties acted in concert for the harmful predominant purpose. The plaintiff must demonstrate TDL and its franchisees intentionally participated in conduct "with a view to the furtherance of the common design and purpose" to injure the plaintiff: *Barroquerio*, at 167. The conspiracy alleged by the plaintiff is between the defendant and its franchisees. Yet, the plaintiff led no evidence whatsoever from any franchisee.

[88] To the extent that the plaintiff expected that the court could draw inferences about franchisees' intent, that would have to be supported by Mr. Gomez's evidence.

For the reasons discussed below (paras. 103–124), I am not persuaded that his evidence provides a sufficient foundation upon which I would draw any inferences.

[89] Regardless of that, TDL submits Mr. Gregoire's evidence is a complete answer to the plaintiff's allegations, making it clear that together with its franchisees, TDL did not conspire to injure employees. TDL emphasizes that dismissal of a claim under Rule 9-6 is mandatory where the court is satisfied there is no genuine issue for trial.

[90] The plaintiff submits Mr. Gregoire's evidence is contradicted by Mr. Gomez's evidence. Since the court cannot weigh evidence, the summary judgment application must be dismissed.

[91] I do not agree there is a contradiction in the evidence. With regard to Mr. Gregoire's statement that the No-hire clause was ultimately economically beneficial to TDL and its franchisees, the plaintiff submits that Mr. Gomez's evidence questions that economic justification. He points to Mr. Gomez's view that the No-hire clause does not "prevent 'poaching' from other companies outside the Tim Horton's franchise" and, therefore, it is not clear it can be effective at promoting investment in training.

[92] Mr. Gomez and the plaintiff misconstrue Mr. Gregoire's evidence and TDL's position. TDL does not assert that the clause was designed to promote investment in training, but to protect the costs of the training that was provided to a franchisee's employees. Nor did TDL purport to suggest anything in the License Agreement was designed (or could be designed) to impact whether employees chose to leave employment at Tim Hortons to work for other companies. Accordingly, I do not find Mr. Gomez's evidence contradicts Mr. Gregoire's on that point, and no weighing of the evidence is required.

[93] The plaintiff also submits that paras. 84–99 from the *2021 RFJ* has already rejected TDL's position. The plaintiff submits in those paragraphs, "the legal issue

[whether the claim of conspiracy is bound to fail] has already been decided in this litigation".

[94] I disagree. Those paragraphs address whether predominant purpose civil conspiracy could survive an application to strike brought under Rule 9-5(1)(a). Therefore, the issue was whether on the pleadings alone, which had to be taken as being true, the claim was bound to fail. That is not the issue before me now. For summary judgment, the plaintiff does not have the advantage of the court being required to assume the factual assertions in its pleadings are true; the court looks at the evidence filed by the parties.



***c. The No-hire Clause in Isolation***

[95] TDL also submits the answer to the proposed third issue (see above, para. 80) is clear and no trial is required. TDL contends that the plaintiff's focus on the No-hire clause in isolation from the rest of the Licence Agreement is improper. TDL submits that the correct approach to contractual interpretation requires a court to construe the purpose of the No-hire clause within the context of the whole License Agreement. TDL asserts the Licensing Agreement is entered into for the economic self-interest of both parties, belying a conclusion that the parties' primary intent was to harm existing or future employees.

[96] The plaintiff submits TDL is wrong to suggest the No-hire clause cannot be viewed in isolation, relying on *Williams v. Audible Inc.*, 2022 BCSC 834 at paras. 111–117.

[97] I do not find that discussion helpful to the facts and issue before me. For one thing, I do not read those paragraphs as purporting to state a general rule about whether provisions in agreements can be analyzed in isolation. Also, Justice Horsman notes that the experts disagreed on a critical issue in that case: "whether the Exclusivity Provisions are properly characterized as a vertical agreement, which would unambiguously have a pro-competitive justification" (para. 113). Therefore, it is not clear to me Justice Horsman came to any conclusion about whether the impugned clause in that case could be viewed in isolation.

[98] I agree that it is generally accepted that the interpretation of a clause within a contract ought to be done in the context of the whole agreement, although that does not necessarily detract from the plaintiff's position in this case. For one thing, Mr. Gregoire deposed that since 2018, TDL is not enforcing the No-hire clause, which may justify viewing it in isolation. Thus, it is not clear to me that the plaintiff's position fails for focussing only on the No-hire clause.

***2. Lack of Evidence of Intent to Harm***

[99] However, even if one isolates the No-hire clause from the rest of the License Agreement, TDL still relies on Mr. Gregoire's evidence that the clause's purpose was to provide assurance to franchisees that their investment in training of employees could not easily be "poached" by other franchisees. It contends his evidence is uncontradicted and, therefore, fatal to the plaintiff's claim.

[100] I agree. In my view, the plaintiff's evidence is silent on an element critical for both predominant purpose conspiracy and unlawful means tort. Under both, the plaintiff must demonstrate that two parties acted in combination or conspired, and the predominant purpose of their conduct (by agreeing to enter the contract, which contained the No-hire Clause as one of its terms) was to injure the plaintiff and members of the proposed class. Mr. Gregoire's evidence unassailably defeats that claim. There is no evidence from any alleged co-conspirator to contradict his claim. I have been given no cogent reason to doubt his reliability or credibility.

[101] The plaintiff relies on Mr. Gomez's evidence. His evidence does not purport to be direct evidence about TDL and its franchisees' intent in entering into agreements containing the No-hire clause. Instead, the plaintiff submits that his evidence provides sufficient reason to conclude that, at the very least, there exists a dispute on that issue, justifying sending the case to trial.

[102] I do not agree, for several reasons.

[103] Most importantly, the foundation for Mr. Gomez's opinions are almost entirely US studies about non-compete clauses in various industries, a number of which

differ form the fast-food industry. As he described, and consistent with my general understanding, non-compete clauses typically exist in employment contracts—meaning the contracting parties are the employer and the employee. The No-hire clause is in a license agreement between a franchisor and franchisees. While it may be acceptable and logical for labour economists, or other academics, to equate the two clauses (although I express no view on that), that does not transfer to the legal analysis.

[104] The issue before the Court is not about the labour market impacts of these types of clauses. To prove a claim in conspiracy, the plaintiff must prove on a balance of probabilities that the intent of the co-conspirators was predominantly to injure the claimant. I cannot see how a court could draw an inference about TDL and its franchisees' intent in agreeing to the No-hire clause, from the intent of parties who enter into an individual employment contract, which contains a non-compete clause.

[105] Moreover, the factual foundation for such an inference is absent. Neither Mr. Gomez nor the studies Mr. Gomez references analyze the intent of those who agree to non-compete clauses. Instead, the studies focus on the impact those clauses have on employee mobility and wages. They did not purport to address what was in the parties' mind when entering the contract.

[106] Mr. Gomez does reference one US report in his second affidavit that briefly mentioned workers at fast-food restaurants who were asked to sign non-compete clauses. From that report and other US studies in other industries, Mr. Gomez speculated that employers were "aware of … deleterious mobility and wage outcomes" of those clauses "suggesting that the purpose of 'buy-side/no-hire' clauses is to harm workers by first reducing their mobility and then suppressing their wages". At the same time, he acknowledges the motivation of those employers to seek the clause is for their "own pecuniary benefit".

[107] His conclusion is problematic for several reasons. It remains rooted in the theory and language of competition law concepts. More importantly, the conclusion

that those employers intended to harm workers is based on a series of suppositions for which he does not provide evidentiary support, including: (i) there are no “trade secrets” or other practices worthy of protection in the fast-food industry; (ii) the employers have no desire to invest in human capital; (ii) employers are aware that non-compete clauses have the effect of suppressing wages because of restricted mobility; and (iii) employers intend to harm workers by reducing their mobility in order to suppress wages.

[108] Moreover, to be relevant to the issues in this case about the No-hire clause in TDL’s License Agreement, one would have to accept as probably true that restricted mobility of workers for one brand in the fast-food industry does, in fact, cause both restricted mobility of those workers generally, and wage suppression across the industry. Lastly, it would also have to be true that harming employees by restricting their mobility in order to suppress wages was the paramount purpose of TDL and its franchisees agreeing to the No-hire clause.

[109] With respect, none of the foregoing amounts to evidence about TDL’s or its franchisees’ intent in agreeing to the No-hire clause. Nor does it amount to non-controversial facts upon which I can draw any inference.

[110] Accordingly, I do not accept that I can draw any inference from Mr. Gomez’s evidence about TDL’s or its franchisees’ intent when they agreed to the No-hire clause. In my view, the plaintiff’s evidence is silent on the question of intent. In the face of TDL’s uncontradicted evidence, the plaintiff’s case has no chance of success.

[111] It is also notable that the studies and research referred to by Mr. Gomez are almost exclusively from the United States. While I respect his academic view that one could assume the situation in Canada would not be different, I am not sure it would be appropriate for a court to make that assumption in the context of a claim of civil conspiracy.

[112] Furthermore, Mr. Gomez’s reports outline academic analyses and studies that purport to identify a correlation between both no-hire and non-compete clauses and

reduced mobility and/or suppressed wages. Assuming such a correlation exists, it is just that: a correlation. Even if one could infer such a correlation probably exists in Canada with respect to the proposed class (findings I explicitly do not make), that still would not provide a sufficient evidentiary basis from which one could infer the parties' intent when entering into the License Agreement.

[113] The plaintiff contends that the court should look to the effects of the No-hire clause to help understand why it was implemented. He argues if the tort does not involve an examination of the consequences of the defendant's actions, any defendant could evade liability by simply "speculating" that the allegedly tortious action was done out of self-interest, suggesting that is what Mr. Gregoire's evidence does. I pause to note that in my view, Mr. Gregoire's evidence is not speculative.

[114] In any event, the plaintiff's general proposition that the effects of an alleged civil conspiracy may be important for a court to examine is sound. However, that does not assist him to resist summary judgment in this case. That is because the significance of the effects or consequences of a conspiracy is no substitute for the necessity of the court to find that the parties acted in concert or conspired to injure employees. The tort simply cannot be established without that element.

[115] Furthermore, TDL's position is not that effects or consequences are irrelevant, but that they cannot take the place of evidence that the parties agreed to act in concert to injure employees.

[116] The plaintiff's entire case rests on the existence of an alleged conspiracy to injure employees because of the inclusion of a specific contractual term in a wide-spread Licensing Agreement. He does not allege anything said or done by TDL or franchise owners in any particular hiring or workplace context caused injury to employees. He does not allege that apart from the No-hire clause existing in the License Agreement, TDL or its franchisees took other actions to injure employees. Thus, the plaintiff's case is wholly dependent upon the court finding that the parties' agreement to that contractual term constitutes an agreement entered into predominantly for the purpose of harming and/or injuring their employees.

[117] Even if one could draw inferences about the contracting parties' intent from the existence of a correlation between the No-hire clause, lack of employee mobility, and suppressed wages (an inference I do not draw), Mr. Gomez's opinion is tentative at best. As described in the plaintiff's submissions, Mr. Gomez provides *commentary* that "there is *reason to believe* 'that the purpose of 'buy-side/No-Hire Clauses' is to harm workers by first reducing their mobility and then supressing their wages" (Emphasis added). With respect, I am not satisfied that this amounts to evidence about whether TDL conspired with its franchisees to injure employees by enacting the No-hire clause; It amounts to little more than a supposition.

[118] Going further, even if one accepted that wage suppression is sufficiently linked to no-hire clauses, and even if one could infer that wage suppression was an anticipated or foreseen effect by the contracting parties (inferences I do not draw), that would still fall short of demonstrating that the predominant purpose of the parties' inclusion of the clause was to harm the plaintiff. Intent to injure must be the main or primary purpose to qualify as the predominant purpose: *LeRoy* at paras. 428, 475–476; *GEA Refrigeration Canada Inc. v. Chang*, 2015 BCSC 1593 at paras. 29–31.

[119] I add that the purported correlation is not even direct, but dependant upon the clause effectively restricting mobility. That is problematic in this case where there is no absolute bar to mobility. Employees can transfer to another franchise where TDL gives written permission. It is difficult to perceive how the plaintiff can prove the parties intended to harm employees if they explicitly allowed for employee mobility. There is no evidence that TDL routinely denied permission. Instead, TDL's evidence suggests the issue rarely arose, but when it did, TDL attempted to reach a resolution between franchisees (see above paras. 24–25).

[120] Nor can the plaintiff meet the test for predominant purpose civil conspiracy based on the clause being implemented primarily for the parties' economic or other self-interest. Acting purely out of self-interest in an employment context is insufficient to establish the tort. For example, even where union members strike with the specific

knowledge that they will economically harm their employers, the court held they did so for the predominant purpose of furthering their own economic interests and, therefore, the tort was not made out: *Southam* at 183–185, 188, 196; see also *Cement LaFarge* at 470-472.

[121] An even stronger example is *Crofter Hand Woven Harris Tweed Co.* at 447. In that case, the concerted actions of a union were aimed at "preventing under-cutting and unregulated competition, and so helping to secure the economic stability of the … industry … to create a better basis for collective bargaining" and improve their wages. The House of Lords concluded that even though the industry was necessarily damaged by the union's actions, that was not the real purpose of the embargo, and the tort failed.

[122] That reasoning is directly applicable. TDL and its franchisees entered into an agreement for their mutual economic benefit. Even if they had foreseen that preventing movement of employees among franchisees without TDL's approval might negatively impact employee wages (a finding I do not make), without more, that does not establish that *was the reason why* they agreed to the No-hire clause.

[123] Lastly, at least a portion of Mr. Gomez's evidence is consistent with TDL's position. He stated the primary motive for businesses in a market economy is "economic in the sense that there is a desire to be profitable and earn returns". He even allowed for the possibility that no-hire clauses, while keeping wages lower, may also provide long-term benefits "for both employees and employers in terms of training investments".

[124] For all those reasons, the plaintiff has not persuaded me that there exists a dispute in the evidence regarding TDL's intent in including the No-hire clause in the License Agreement. Accordingly, I am not convinced there exists a genuine issue for trial.

## V. CONCLUSIONS

[125] For all the reasons explained in this judgment, I grant summary judgment and dismiss the plaintiff's claim.

[126] I am not persuaded that the plaintiff's evidence or submissions identify a genuine issue for trial. This is mainly because the plaintiff has not adduced any evidence that the primary goal of the No-hire clause was to injure employees. Instead, the plaintiff relies on Mr. Gomez's opinions based on academic studies which focus on the effects of clauses potentially akin to the No-hire clause. Those studies do not pertain to intent, and therefore with regard to a material fact in issue, they are speculative and indirect, at best, as are Mr. Gomez's opinions. Moreover, the studies are almost all from the US focussed largely on non-compete clauses (contained within employee-employer contracts), and the plaintiff did not establish the applicability of those to franchisee-franchisor agreements.

[127] Since the claim for predominant purpose civil conspiracy fails, the plaintiff's claim for the unlawful means tort must also fail as it depended on the success of the former.

[128] I will not address certification as there is no action left to certify.

"Sharma J."