

Eggspectations inc. (Restaurants Eggspectation Québec inc.) c.
9157-6561 Québec inc.

2012 QCCS 379

SUPERIOR COURT

CANADA
PROVINCE OF QUEBEC
DISTRICT OF MONTREAL

DATE: February 9, 2012

IN THE PRESENCE OF THE HONOURABLE PAUL MAYER, J.S.C.

No: 500-17-044682-089

**EGGSPECTATIONS INC.
RESTAURANTS EGG SPECTATION QUÉBEC INC.**
Plaintiffs/Cross-Defendants

v.

9157-6561 QUÉBEC INC.
Defendant/Cross-Plaintiff

and

9018-4094 QUÉBEC INC.
Intervenant

No: 500-17-049674-099

**9157-6561 QUÉBEC INC.
NEWTON BASTIAMPILLAI**
Plaintiffs

v.

**RESTAURANTS EGG SPECTATION QUÉBEC INC.
EGGSPECTATIONS INC.
EGGSPECTATIONS CANADA INC.
JIMMY SKINDILIAS FAMILY TRUST
JIMMY SKINDILIAS
ENZO RENDA FAMILY TRUST
ENZO RENDA**
Defendants

and

GERVAIS & GERVAIS, s.e.n.c.

Mise en cause

**TRANSCRIPTION OF JUDGEMENT
RENDERED ORALLY ON FEBRUARY 3, 2012¹**

1. INTRODUCTION

[1] The administration of justice has not been swift and efficient in this case even though it was urgent more than three years ago. This judgement will explain why and hopefully put an end to this matter once and for all.

[2] The Court is seized with two motions that were joined together in April 2011.

[3] In the first file, ("**File 089**")² that started with a demand letter in June 2008, the Plaintiffs, Eggspectations Inc. and Restaurants Eggspectation Québec Inc. ("**REQUI**") are seeking:

- a) the termination of a franchise agreement and a sublease agreement concluded with 9157-6561 Québec Inc. ("**9157**"); and
- b) the payment of unpaid rent, royalty and marketing fees.

[4] 9157 has filed a cross-suit claiming the sum of \$265,000 from Eggspectations Inc. and REQUI.³

[5] 9018-4094 Québec Inc. (the "**Landlord**") has intervened in this case. It asks that the sublease be terminated and that it be paid some unpaid rent.

[6] In the second file, ("**File 099**")⁴ commenced in January 2009, 9157 and its majority shareholder, Mr. Newton Bastiampillai ("**Mr. Bastiampillai**") seek some \$2.3M in damages against multiple parties, namely, REQUI, Eggspectations Inc., Eggspectations Canada Inc., Jimmy Skindilias Family Trust ("**JSFT**"), Mr. Jimmy Skindilias ("**Mr. Skindilias**"), Enzo Renda Family Trust ("**ERFT**") and Mr. Enzo Renda ("**Mr. Renda**").

¹ As permitted by the Court of Appeal case of *Kellogg's Company of Canada v. P.G. du Québec* [1978] C.A. 258, 259-260, the Court reserved the right, if it was asked to provide a written judgement to modify, develop, expand and revise the motives of this Judgement in order to reshape and improve its presentation and comprehension.

² Bearing number 500-17-044682-089

³ \$125,000 of that counterclaim concerns the payment of damages further to an alleged mismanagement of 9157 by Mr. Reginald, Eggspectations Inc. and REQUI. It seeks an additional amount of \$140,000 as punitive damages for the intentional breach of 9157's rights to enjoy the Premises and the franchise peacefully.

⁴ Bearing number 500-17-049674-099.

[7] In this case, JSFT and ERFT are claiming a balance of sale owing by Mr. Bastiampillai to the family trusts further to Mr. Bastiampillai's purchase of their shares in 9157.

[8] In their counterclaim, Eggspectations Inc. and REQI ask for the dismissal of the Plaintiffs' motion, that they be declared vexatious litigants and be condemned to pay the substantial extrajudicial fees they have incurred.

2. THE FACTS

[9] After having heard some 13 witnesses and taken cognizance of approximately 200 exhibits, over a period of 11 days, the Court resumes the facts as follows.

2.1 The parties

[10] REQI is a company owned by Messrs. Renda and Skindilias.⁵ It is a franchisor of restaurants operated under the name "*Eggspectation*" that specialises in the service of breakfast and lunch. There are nine such restaurants in the Province of Quebec, two in Ontario, five in the United States and three in India.

[11] These restaurants are operated by franchisees of REQI.

[12] Eggspectations Inc. is owned by Messrs. Renda and Skindilias.⁶ It was incorporated to lease the premises situated at 201 St-Jacques Street West (the "**Premises**") from the Landlord. It operated the franchise at the Premises from 2002 to 2005.

[13] 9157 is the franchisee of REQI for the *Eggspectation* restaurant operated at the Premises.

[14] Eggspectations Canada Inc. is, for some unexplained reason, a defendant in File 099 simply because it is a shareholder of REQI. Otherwise, it has no other involvement in this matter.

[15] JSFT and ERFT are the legal entities created by Mr. Skindilias and Mr. Renda to hold their respective shares of 9157.

[16] Mr. Skindilias is a self-made man who has worked every function in a restaurant. He is the founder of the *Eggspectation's* concept that he developed after a long association with the famed *Sunshine Boys* food empire. He opened his first one in 1993.

[17] He is currently the President and Secretary-Treasurer of Eggspectations Canada Inc. and the President and Chief Operating Officer of REQI. He is involved in the day-to-day operations of REQI, working in tandem with Mr. Renda.

⁵ Exhibit D-74.

⁶ Exhibit D-6.

[18] Mr. Renda immigrated to Montreal in 1976 at the age of 16. He is also a self-made man and a *Sunshine Boys* alumni. He has been the Chief Executive Officer of Eggspectations Inc. and REQI since 2005. His responsibilities include marketing and selling franchises.

[19] Mr. Bastiampillai is a native of Sri Lanka. He immigrated to Canada in 2001. For a period of some five years, he ran a travel agency, Travel Air Inc. He became a shareholder of 9157 in July 2005 and obtained majority control in the fall of 2007. He has been the manager and operator of the *Eggspectation* restaurant at the Premises since April 2008.

2.2 The contractual relationship

[20] This frustrating story and failed business venture started in the spring of 2005.

[21] At the time, Mr. Mariampillai Reginald ("**Mr. Reginald**") was working in Montreal as the sales director of a company that was not going very well.

[22] He had a friend, Raja, who owned a part interest in the *Eggspectation* franchise situated on the corner of De Maisonneuve Boulevard and Mountain Street, in Montreal. Owning such a franchise interested him so his friend introduced him to Mr. Renda who showed him the restaurant situated at the Premises.

[23] Mr. Renda recalls that this particular location was their flagship. They had spent much effort and money on its design. The 5,700 sq. ft. - 200 seat restaurant (including a mezzanine and basement office) is situated in the heart of Old Montreal. There are half a dozen hotels nearby. He remembers that they sometimes had line-ups to get in on weekends and he used to show it off with pride to potential franchisees.

[24] Mr. Renda referred Mr. Reginald to *Eggspectation's* controller, Mr. Pradeep Anand ("**Mr. Anand**") to examine sales and financial reports with respect to the restaurant's operations.

[25] Mr. Reginald, who was assisted by Mr. Wazid Mohamed, a management consultant and certified general accountant, met with Mr. Anand.

[26] He gave them a three-page document showing actual and declared (to the taxing authorities) sales as well as certain costs and income (or loss) figures for the restaurant from 2002 to 2005.⁷

[27] The 2004 figures showed an overall loss of \$270,000. By adding the approximate \$360,000 of undeclared sales, there was a profit of some \$50,000.

[28] These are not accounting practices to be proud of in the open public daylight of a courtroom. It does seem, however, that this was the manner to operate a restaurant at the time.

⁷ Exhibit D-40.

[29] After some back and forth negotiations with Mr. Renda, it was agreed that the purchase price of the Old Montreal restaurant was \$800,000 (including a \$50,000 franchise fee).

[30] Mr. Reginald described in detail how he negotiated with Mr. Renda on two or three occasions before convincing his daughter, Mrs. Reshani Reginald ("**Mrs. Reginald**") to invest in this venture. They mortgaged the family home to do so.

[31] He recalls that the price he had negotiated was very high so he did not have the required sum. He, therefore, looked for partners to invest with him, including, Mr. Amala Cherubim ("**Mr. Cherubim**") and Mr. Bastiampillai.

[32] He did not know it at the time but he had just made a terrible mistake: he had selected Mr. Bastiampillai as a partner. He would soon regret this fateful decision that ultimately led to this ruinous litigation.

[33] Mr. Bastiampillai went through the financial information that Mr. Reginald had obtained and was not satisfied. He wanted to better understand the performance of the restaurant and the income he could derive from it. He met with Mr. Renda and Mr. Anand and visited the Premises.

[34] He eventually decided to join the Reginald Group.

[35] They still did not have the money required to purchase the restaurant so Messrs. Renda and Skindilias decided to remain involved and to form a joint venture with the group to own the restaurant.

[36] 9157 was incorporated on June 16, 2005.⁸

[37] The shareholders on July 8, 2005, were as follows:

- | | | |
|----|-------------------|-----------------------|
| a) | Mr. Reginald | 75,000 common shares |
| b) | Mr. Cherubim | 40,000 common shares |
| c) | Mr. Bastiampillai | 85,000 common shares |
| d) | ERFT | 175,000 common shares |
| e) | JSFT | 175,000 common shares |

[38] The Reginald Group held 36% of the shares of the company and the family trusts held the remaining 64% of shares.

[39] On that date, 9157 entered into the numerous contracts, including the following:

- a) an asset purchase agreement⁹ whereby it purchased the assets and liabilities of the *Eggspectation* restaurant in the Premises;

⁸ Exhibit D-1.

⁹ Exhibit D-7.

- b) a franchise agreement (the "**Franchise Agreement**")¹⁰ pertaining to the operations of the restaurant under the *Eggspectation* banner;
- c) a management agreement (the "**Management Agreement**")¹¹ pursuant to which REQL undertook to supervise and direct, at the expense and for the benefit of 9157, all staff employed in the restaurant. It also undertook to fulfill the duties described in Section 3.2 thereof. Verbally, they agreed to leave the day-to-day management with the two managers who had been running things until then;
- d) an escrow and option agreement.¹² The objective was that the Reginald Group would eventually own all of the shares of 9157;
- e) a sublease agreement (the "**Sublease Agreement**")¹³ with respect to the Premises;
- f) a shareholders agreement¹⁴ that stipulated that the key employees of 9157 would be Mr. Tommy Tassovac, the manager, and Mr. Reginald.

2.3 The operations of the franchise (2005-2006)

[40] Mr. Reginald recalls that he was mandated by the shareholders to take care of the financial administration and management of the restaurant.

[41] He used an office located in the basement of the Premises where he ensured that the cash received from waiters would be entered correctly into the system and that it balanced. He paid bills, did some accounting, filed income tax reports, etc. He took care of all administrative and accounting functions and submitted monthly financial reports to the shareholders.

[42] For this, he was paid \$450.00 a week (through his daughter).

2.4 The trouble begins

[43] Right then and there - trouble started.

[44] Mr. Bastiampillai denies that he ever agreed to all of this. He says that he made "*one big error*". When he arrived at the law firm on July 8th to sign the documentation, he had not read a single word. He insists that he had no idea that Mr. Reginald was going to act on his behalf or that he would even be signing cheques.

[45] In the fall of 2005, Mr. Bastiampillai began to voice his concerns. He told his fellow shareholders that he was unhappy with Mr. Reginald's and REQL's management of the restaurant. Further, he indicated that he was not happy with his return on investment.

¹⁰ Exhibits P-1 and D-13.

¹¹ Exhibit D-14.

¹² Exhibit D-20.

¹³ Exhibits D-16, P-4 and IN-1.

¹⁴ Exhibit D-19.

[46] He alleges that he was promised \$2,500 per month for his \$85,000 investment. A real goldmine it was going to be ... but after three or four months, he noticed that the expected 25% return on his investment was not on this restaurant's menu.

[47] The Court notes that, notwithstanding his complaints, he did, nevertheless, exercise an option to purchase more shares of 9157 in late 2005.¹⁵

[48] According to Mrs. Reginald, Mr. Bastiampillai started fighting and questioning every decision. She believed he wanted to take over the restaurant. Hindsight shows that she was right.

[49] Mr. Reginald also recalls that Mr. Bastiampillai was complaining all the time. Among other things, he was unhappy with the financial reports he was receiving. He also felt that REQI was not running the restaurant properly.

[50] Mr. Anand says that Mr. Bastiampillai asked that a meeting of all shareholders be called in December 2005.

[51] He remembers that he voiced numerous complaints. He was surprised that Mr. Reginald was: (i) signing cheques on behalf of the company, (ii) receiving a salary for his work, and (iii) the financial information he was receiving was insufficient.

[52] Mr. Renda recalls that the disagreements between Mr. Reginald and Mr. Bastiampillai affected all shareholders. He remembers that he did not like how Mr. Reginald handled his administrative duties or how he was paying suppliers. He complained that there was too much staff in the restaurant. He questioned whether one really needed two managers.

[53] In March 2006, JSFT and ERFT sold 99,000 common shares to Mr. Yamine Jamal and Mr. Jeyacandeepan Pasupathy.¹⁶

[54] From then on, the ownership of the common shares of 9157 was as follows:

a)	Mr. Bastiampillai	22.2%
b)	Mr. Reginald	20.4%
c)	Mr. Cherubim	7.2%
d)	Mr. Jamal	18%
e)	Mr. Pasupathy	18%
f)	JSFT	7%
g)	ERFT	7%

¹⁵ Exhibit P-22.

¹⁶ Exhibits P-53 and P-54.

[55] The arguments and fighting continued. It reached a point of such discord that the shareholders decided in May 2006 that, on a rotational basis of three months, Mr. Bastiampillai would share administrative duties with Mr. Reginald.¹⁷ To stop the fractious stirring up of mud, it was decided to give him a chance to run things for a while.

[56] Mr. Skindilias recalls that he decided to support this initiative because he wanted peace. He thought this would solve the fighting. Unbeknownst to him at the time, he was wrong. Things would only get worse.

2.5 Mr. Bastiampillai's operation of the restaurant – May 1st to August 23, 2006

[57] Mr. Renda remembers that during Mr. Bastiampillai's administration, he had a difficult time understanding basic accounting functions.

[58] Mr. Anand says that during this period, he and Mr. Bastiampillai shared signing authority for cheques of 9157. He claims he provided him with support and gave basic advice with respect to the computer systems and the accounting program.

[59] In August 2006, at the end of his three-month rotation, Mr. Bastiampillai revealed what he describes to be a fraudulent scheme to deprive 9157 of revenues with order cancellations.

[60] As a result of these concerns, he approached Mr. Anand who informed him that he would speak about the issue with Mr. Renda.

[61] Mr. Bastiampillai says he was unsatisfied with the answers he was given and that he did not appreciate being treated like a fool.

[62] He remains convinced, to this day, that valid orders were fraudulently being declared and cancelled when, in fact, they had been paid. Thus, vast unknown quantities of cash were being diverted to his detriment. He continues to hold this view despite the fact that his own expert testified that the cancellations in the restaurant are well within industry norms.¹⁸

[63] On August 1st, Mr. Bastiampillai was supposed to hand back the financial management of 9157 to Mr. Reginald, but he refused to do so.

[64] Mr. Bastiampillai insists that he did not understand that his management position would be on a rotational basis. This, even though he was present at the meeting in May 2006 when the decision was made and he was the recipient of the email which confirmed the resolution of the board of directors of 9157 with respect to the rotational management.¹⁹

¹⁷ Exhibit P-6.

¹⁸ Exhibit D-77 – Examination report by Antranig Bedrossian, B.Comm, CMA, p. 2, which states that sales are sometimes cancelled due to errors or customer complaints. He noted that the cancellations in the restaurant were in the range of 1.7% and 1.9%.

¹⁹ Exhibit P-16.

[65] On August 12th, after numerous and lengthy discussions between Mr. Bastiampillai and Mr. Renda, he agreed he would hand over his administrative duties to Mr. Reginald. Then, three days later, he said that he had never agreed to anything with Mr. Renda or anyone else.

[66] A shareholders meeting was held the following day with all shareholders present, either in person or through proxies. Although invited, Mr. Bastiampillai did not attend. The shareholders decided that Mr. Reginald should take over the administration of the franchise. They were angry at the way Mr. Bastiampillai was acting. They did not care for his bullying tactics.

[67] A letter was sent by courier to Mr. Bastiampillai that advised him that, effective immediately, he was no longer authorized to carry out any more work related to 9157. He was asked to return all accounting, banking or related documents, including keys to the office.²⁰

[68] On August 24th, Mr. Reginald was able to assume his responsibilities.

[69] He wrote all shareholders on September 20th to make a progress report of the situation as he found it on August 25th. It provides an illuminating picture of the situation left behind by Mr. Bastiampillai. He noted, among other things, the following:

- a) the paperwork and documentation which were handled by Mr. Bastiampillai were not in order;
- b) about 18 suppliers were long past due in payments;
- c) he had to pay large amounts of cash to a few suppliers as they threatened to stop delivery;
- d) he immediately paid outstanding bills, including a cheque of some \$2,000 to *Parmalat*, otherwise they would have interrupted supplies;
- e) he wrote about 40 cheques within a week to suppliers so as to avoid interruption of supplies;
- f) given the situation, 9157's credit rating had been affected and he had to negotiate with some suppliers for credit;
- g) the office was in disarray. Certain files were missing. Paid and unpaid bills were all mixed up. Some were missing;
- h) seven blank cheques had been taken by Mr. Bastiampillai and he had to stop payment on those cheques at a cost;
- i) Mr. Bastiampillai had removed the defective hard-drive of the computer from the office;

²⁰

- j) by not handing over the tax returns in time for 2005, 9157 incurred an amount of approximately \$800.00 as fines and penalties from Revenue Canada; and
- k) finally, Mr. Bastiampillai had taken nine sets of signed share transfer documents between Mr. and Mrs. Reginald which were never returned.

[70] Later that month, Mr. Bastiampillai wrote a demand letter to the shareholders and asked that he be reimbursed his investment.

[71] Mr. Reginald came up with an investor who offered to purchase Mr. Bastiampillai's shares. He wanted \$40,000 more than he had paid "*because that's what they were worth*" he says. The sale did not materialise.

2.6 The winding-up procedures

[72] In December 2006, Mr. Bastiampillai filed a motion against his six fellow shareholders. He sought the winding-up of the business and affairs of 9157.²¹

[73] In August 2007, Mr. Pasupathy sold his shares of 9157 to Mr. Bastiampillai. He recalls that he was not satisfied with his return on his investment. He noted that food and labour costs were skyrocketing.

[74] Mr. Jamal followed suit shortly after.

[75] In September 2007, REQI took an action in defamation against Mr. Bastiampillai, as he was allegedly spreading false information concerning REQI to other franchisees.²²

[76] In October 2007, Mr. Cherubim agreed to sell his shares of 9157 to Mr. Bastiampillai. He recollects that he was scared by the lawsuit and worried that he would lose his \$40,000 investment. He was unhappy with the fact that he was being asked to contribute to the legal fees necessary to defend against the winding-up action. He remembers selling his shares for the same amount that he had paid for them.

[77] Thus, by October 2007, with a little help from the legal system, Mr. Bastiampillai had achieved part of his goal. He was now the majority shareholder of 9157.

2.7 Mr. Bastiampillai takes control of the restaurant

[78] At the beginning of 2008, Mr. Bastiampillai met with Messrs. Renda and Skindilias to see if they would buy his shares or if he could purchase theirs.

[79] Mr. Skindilias recalls that they offered to purchase his shares for the price that he had paid but Mr. Bastiampillai refused. Mr. Bastiampillai denies this.

²¹ Exhibit P-18.

²² Exhibit NB-8 to the examination after plea of Mr. Bastiampillai of March 12, 2010.

[80] At their next meeting, Messrs. Renda and Skindilias agreed to sell. They recall asking for \$250,000 but after some discussion, they accepted \$210,000.

[81] On April 17, 2008, Mr. Bastiampillai purchased the shares of JSFT and ERFT for the amount of \$210,000, a sum that was to be paid in equal parts to each family trust.²³ \$50,000 was paid to each of the family trust at closing. A balance of sale of \$100,000 was to be paid by Mr. Bastiampillai no later than April 17, 2009 with a final balance of sale of \$10,000 to be paid no later than June 17, 2009.

[82] As of the present date, the sum of \$110,000 (\$55,000 to each) has yet to be paid by Mr. Bastiampillai.

[83] The Court notes that at the time, Mr. Bastiampillai was living on welfare. He has not provided the proof of the provenance of the money used to pay for the shares despite an undertaking to provide same.

[84] Mr. Renda explains that the agreement of sale was subject to two important conditions for the vendors: (i) the Management Agreement would be terminated but Mr. Bastiampillai would follow the *Eggspectation's* System and standards; and (ii) all lawsuits would stop.

[85] Mr. Renda recalls that Mr. Bastiampillai had promised that he would keep a manager or hire a new manager that was going to be trained. Mr. Bastiampillai spoke to the manager, Mr. Hani Moktar ("**Mr. Moktar**") and it was agreed that he would remain.

[86] Mr. Skindilias says that during negotiations that led up to the sale of April 2008, Mr. Bastiampillai undertook that the restaurant would be managed properly. It was also agreed that both parties would stop their litigation, They would start with a "*clean slate*".

[87] Mr. Bastiampillai denies that there was ever a transaction to settle legal claims. He does not recall the topic even being discussed. He says that, in his mind, the winding-up action had been settled in the fall of 2007.

[88] The agreement of sale stipulates that the vendors had the right to approve the manager of the restaurant.²⁴

2.8 Events subsequent to the sale of the family trusts' shares to Mr. Bastiampillai

[89] Mr. Renda recalls that a week after the purchase, Mr. Bastiampillai fired the manager and he took over that position.

[90] According to Mr. Skindilias, things started to go downhill immediately after this.

²³ Exhibits D-24 and D-25.

²⁴ Exhibit D-25, section 7.6.

[91] He recalls that he used to drop by the restaurant from time to time to see how things were going and to offer suggestions. At one point, he was accused by Mr. Bastiampillai of being abusive. Mr. Skindilias says that he was not allowed to speak to the employees, even those he had known for many years.

[92] Next ensued a chaotic period of rotating employees. Mr. Reginald remembers that Mr. Bastiampillai was firing and hiring employees every other day.

[93] A few weeks later, Mr. Reginald was locked out of the office and was not allowed to return to the restaurant. Mr. Reginald remembers that Mr. Bastiampillai told the chef not to serve him lunch. (He must have forgotten his good manners. After all, Mrs. Reginald was still a shareholder.)

[94] Shortly after, Mrs. Reginald agreed to sell her shares to Mr. Bastiampillai.

[95] On July 24th, she sold her shares to Mrs. Rajinie Mariathas ("**Mrs. Mariathas**"),²⁵ who is Mr. Bastiampillai's girlfriend. She agreed to pay \$100,000 for the shares, \$10,000 less than had been paid. \$40,000 was paid on closing. The balance of sale of \$60,000 has not been paid.

[96] Mrs. Reginald has taken an action against Mrs. Mariathas and Mr. Bastiampillai to recover the sum unpaid. They took a counter-suit of \$180,000 for the "*catastrophic*" mismanagement of the restaurant by Mr. Reginald, a sum greater than the purchase price of the shares.²⁶

[97] On Saturday June 7th, short on staff, Mr. Bastiampillai called Mr. Renda to tell him that he was not opening the following day. So, on a Sunday, Mr. Renda and Mr. Skindilias spent the whole day helping out in the kitchen and in the restaurant with customers to give him a hand.

[98] In May 2008, 9157 stopped providing REQI with weekly sales reports. It then stopped payments of royalties in June.

[99] Mr. Bastiampillai explains that REQI was not helping him. Why should he pay them? He also says that there were too many irregularities.

2.9 File 089

[100] On June 17, 2008, REQI sent Mr. Bastiampillai and 9157 a detailed demand letter²⁷ that outlined a number of defaults relating to the Franchise Agreement, including the failure to:

- a) provide weekly sales reports;
- b) pay the weekly royalty fees;
- c) pay the marketing fees;

²⁵ Exhibit D-26.

²⁶ Exhibit P-44, par. 17, 19 and 20 of the *Défense et demande reconventionnelle*.

²⁷ Exhibit P-5.

- d) cause the operator to complete the initial training program;
- e) have a manager and operator devoted fulltime to the operations of the restaurant;
- f) ensure that the franchise was operated during business hours;
- g) maintain good relations with its suppliers.

[101] On July 4th, REQI sent 9157 and Mr. Bastiampillai a default notice.²⁸ It was pointed out that 9157 had failed to comply with its previous notice and cure its defaults, thereby enabling REQI to terminate the Franchise Agreement. It notified 9157 that the Franchise Agreement was terminated.

[102] On August 11th, 9157 was served with an introductory motion whereby REQI asked for the rescission of the Franchise Agreement and the Sublease Agreement as well as the payment of unpaid royalties fees and management fees.

[103] On September 30th, Eggspectations Inc. and REQI applied for the issuance of a safeguard order.

2.9.1 The safeguard order

[104] On October 14th, the matter was heard before Mr. Justice Brian Riordan. On the 16th, he issued a very detailed and precise order:

"GRANTS the Motion for the Issuance of a Safeguard Order;

ISSUES a safeguard order to remain in force until 5:00 p.m., February 9, 2009;

ORDERS 9157-6561 Quebec Inc. to provide all of the financial information required by the Franchise Agreement (Exhibit R-1), including but not limited to the weekly report on its gross sales, and this, on the Tuesday of each week;

ORDERS 9157-6561 Quebec Inc. to deposit into court or into an interest-bearing trust account managed by Plaintiff's attorneys fifty percent (50%) of the weekly amounts due under the said Franchise Agreement as royalty fees, plus applicable taxes, and this, on the Tuesday of each week;

ORDERS 9157-6561 Quebec Inc. to deposit into court or into an interest-bearing trust account managed by Plaintiff's attorneys fifty percent (50%) of the weekly amounts due under the said Franchise Agreement as advertising contributions or contribution, plus applicable taxes, and this, on the Tuesday of each week;

ORDERS 9157-6561 Quebec Inc. to update Schedule "A" of the said Franchise Agreement and provide a copy to Plaintiffs within five (5) days of the present judgement;

²⁸ Exhibit P-6.

ORDERS 9157-6561 Quebec Inc. to abide by the obligations stipulated in the Franchise Agreement pertaining to the operation of the franchise, as follows;

ORDERS 9157-6561 Quebec Inc. to have one of its employees attend and successfully complete the final training program referred to in the said Franchise Agreement as well as an additional training program specified from time to time by Eggspectations Inc.;

ORDERS 9157-6561 Quebec Inc. to operate the Old Montreal Franchise during the days and between the hours specified in the franchise manual and namely from 6:00 a.m. to 3:00 p.m. on Monday through Friday and from 7:00 a.m. to 4:00 p.m. on Saturday and Sunday;

ORDERS 9157-6561 Quebec Inc. to maintain a sufficient number of competent employees in order to operate the franchise restaurant efficiently, to pay the employees in a timely fashion in accordance with their contracts of employment and ensure that employees offer efficient and courteous service;

ORDERS 9157-6561 Quebec Inc. to provide a copy of any and all notices of default provided to it pursuant to the lease or any failure to comply with any law, by-law or regulation within two (2) days of receipt thereof;

ORDERS 9157-6561 Quebec Inc. to allow a representative of Eggspectations Inc. to enter and inspect the premises operated by it during business hours and examine the products and services offered by it;

ORDERS 9157-6561 Quebec Inc. to cooperate fully with the Eggspectations Inc. during any inspection and to provide the assistance requested during the examination and inspection of the products and services offered by it and the determination of whether it is operating the franchise restaurant in accordance with the said Franchise Agreement;

ORDERS 9157-6561 Quebec Inc. to pay to the Mise-en-cause, 9018-4094 Québec Inc., the monthly rent due under the lease for its premises on the first of each month by cheque and to immediately provide a copy of said cheque to Eggspectations Inc.;

DECLARES that upon any default by 9157-6561 Quebec Inc. to comply with the deposits ordered under the present judgment, and this, as of Tuesday October 21, 2008, 9157-6561 Quebec Inc will be foreclosed from contesting the present action, or as the case may be, that their contestation shall be ipso facto struck and that these proceeding shall proceed by default;

ORDERS the provisional execution of the present safeguard order notwithstanding appeal;"

2.9.2 After the safeguard order

[105] Some 10 days later, on October 27th, Mr. Johnny Karellopoulos ("Mr. Karellopoulos") director of operations for REQI visited the Premises to carry out an inspection. He arrived at 8:00 a.m. and left at 9:50 a.m. Mr. Bastiampillai was absent. He reviewed the results of his inspection with the head-waitress and the kitchen manager.

[106] A few days later, on October 30, 2008, Mr. Karellopoulos returned to inspect the Premises with Mr. Skindilias. Mr. Bastiampillai arrived 20 minutes after them. He indicated that they could go ahead with the inspection but he did not want to follow them around.

[107] The overall score of the inspection was 72%.

[108] The *Eggspectation* quality assurance report indicates a thorough inspection was carried out.²⁹ Numerous faults are noted in terms of cleanliness, food safety issues and undated food products.

[109] The recommendations at the end of the report indicate that Mr. Bastiampillai refused to sign the audit sheet and action plan and to sit down to review the condition of the restaurant with Mr. Karellopoulos.

[110] He remembers that Mr. Bastiampillai said that the report was only one person's observations. He retorted that no, they were facts.

[111] The corrective action form identifies approximately 30 items to be improved, including numerous items concerning possible cross-contamination of products, storage of food at improper temperatures, the necessity to clean and sanitize equipment and vents, walls and floors, etc. Most troubling, was the fact that a quality-control-check list was not being completed.

[112] On December 1, 2008, REQI served a demand letter on 9157 to put it on notice that it was not respecting the safeguard order rendered by Justice Riordan.³⁰

[113] In front of all the mounting evidence that things were falling apart at the restaurant and that the safeguard order was not being complied with, Eggspectations Inc. and REQI applied to the Superior Court for a judgement that would declare 9157 foreclosed from pleading in the present file and have it evicted from the Premises.

2.10 The eviction order

[114] On December 9, 2008, after hearing the parties, Madame Justice Marie Gaudreau, rendered a judgement. The Court granted the Plaintiffs' motion to have 9157 foreclosed from pleading and ordered its eviction from the Premises.³¹

²⁹ Exhibit P-70.

³⁰ Exhibit P-69.

³¹ Exhibit D-28.

Her judgement lacked no clarity. History shows that it was the right decision. It declared as follows:

"GRANTS *Plaintiffs' Amended Introductory Motion;*

DECLARES *that 9157-6561 Québec Inc. is foreclosed from pleading in the present file an **STRIKES** 9157-6561 Québec Inc.'s Plea and Cross-Suit from the present file;*

DECLARES *the franchise agreement between Restaurants Eggspectation Québec Inc. and 9157-6561 Québec Inc. terminated as of July 14, 2008;*

CONDEMNNS *9157-6561 Québec Inc. to pay to Restaurants Eggspectation Québec Inc. the sum of \$43,570.71, plus interest at the legal rate and the additional indemnity provided for in article 1619 of the Civil Code of Quebec since June 17, 2008;*

DECLARES *the Sublease agreement between Eggspectation Inc. and 9157-6561 Québec Inc. terminated as of July 14, 2008;*

CONDEMNNS *9157-6561 Québec Inc. to pay to Eggspectation Inc. the sum of \$6,860.53 plus interest at the legal rate and the additional indemnity provided for in article 1619 of the Civil Code of Quebec since June 17, 2008;*

ORDERS *the execution of the present judgement notwithstanding appeal;*

ORDERS *9157-6561 Québec Inc. to vacate the subleased premises situated at 201, West St-Jacques Street, judicial district of Montreal, province of Québec;*

Should the Defendant default in vacating the leased premises hereinabove described;

ORDERS *9157-6561 Québec Inc. including its employees, representatives and any other person under its authority to vacate the leased premises without any further notice or delay;*

AUTHORIZES *the execution of a writ of ejection a Saturday or any other non judicial day;*

EXEMPTS *the Plaintiffs, the Defendant 9157-6561 Québec Inc. with a forty-eight (48) hour notice, the whole in accordance with article 565 of the Civil Code of Procedure;*

AUTHORIZES *Eggspectations Inc. to change the locks of the premises further to the approval of the landlord,*³²

[115] Mr. Bastiampillai was present at the hearing on December 9, 2008.

2.11 The eviction

[116] Shortly after, although Mr. Bastiampillai was represented by Mtre. Joseph Ionata and no substitution of attorneys had been filed into the record, Mtre. Olivier Chi Nouako contacted *Eggspectation's* attorneys to advise them that he intended to challenge the execution of the judgement before the Court of Appeal.

[117] By mid-afternoon, Mtre. Chi Nouako and Mtre. Ionata were advised by *Eggspectation's* attorneys that they had received instructions to proceed with the execution of the judgement.³³

[118] Mr. Renda testified that his objective that day was to ensure that the judgement was executed in accordance with the law. He explains that he wanted to ensure that the reputation of the brand was protected and that the integrity and goodwill of the franchise System be safeguarded. He recalls the horrors stories about the Premises that were being heard throughout the franchise chain: "*all the way to Laval*".

[119] He remembers interacting on and off with the bailiff that afternoon.

[120] The bailiff arrived at the Premises at the end of the restaurant's business day. He explained to Mr. Bastiampillai what he was there to do and presented Justice Gaudreau's judgement.

[121] Mr. Renda recalls that originally Mr. Bastiampillai said he would move out but he then changed his mind. He suggested to the bailiff that Mr. Bastiampillai could use a moving company that *Eggspectations* uses.

[122] Mr. Bastiampillai apparently said he did not care and told them to do what they wanted.

[123] Given Mr. Bastiampillai's refusal to take possession of 9157's property, he was told by the bailiff that this would force him to place the property on the sidewalk.

[124] Mr. Bastiampillai explains that he told the bailiff that he was taking the matter to the Court of Appeal and that he would not take possession of his property. After a few hours of talking with the bailiff and his attorney by telephone, he left the Premises. He remembers being so traumatised by the eviction that he was unable to gather his property.

³² Exhibit D-28.

³³ Exhibit P-71.

[125] The result of this impasse was dramatic as all of the restaurant's furniture and equipment were placed in the snow on the sidewalk in front of the restaurant.³⁴

[126] A series of newspapers articles describe how on December 11th, the police were shoeing people away from the contents of the restaurant that had been "*tossed onto the sidewalk*".³⁵

[127] Mr. Renda was quoted in one article to have said:

"Legally, we asked the operator to come and pick up his equipment because it belongs to him. [...] He refused and he said he didn't care [...] It was either that or wait another three years in court and we didn't have an option to tell you the truth [...] We're repossessing the [...] location and we're going to reopen within the next few weeks".

[128] The most striking thing he said was that he accurately predicted the number of years this case would take before it was heard. He was off by only one month!

[129] Another article indicated as follows:

"This piece of news should come as no surprise to anyone walking around Old Montreal on December 11: the popular Old Montreal location of Eggspectation is closed, at least for the next little while. After a heated dispute between the Eggspectation chain and its St-Jacques Street franchisee, the restaurant was evicted, and everything – including the kitchen sink – was strewn out on the sidewalk. Food, documents, cooking equipment, and even some money found its way onto the street, while passersby dodged police tape to try to snatch it."

[130] In yet another article, it was reported that the Ville-Marie borough councillor, Mr. Karim Boulos, said the "*borough was caught by surprise*" and that they had hired a company called "*Go Cube Inc. to clean up the mess*".

2.12 The stay order from the Court of Appeal

[131] Three days after the hearing before Justice Gaudreau, 9157 made an application with the Court of Appeal to obtain the stay of the eviction order.

[132] On December 17, 2008, the Court of Appeal granted 9157's motion. It suspended provisional execution of the eviction order.³⁶ It allowed 9157 to reintegrate the Premises at its cost and ordered it to conform itself to the safeguard order of October 2008.

³⁴ Exhibit D-31 – contains a series of photographs that show the restaurant's equipment and furniture, complete with Christmas decorations, lined several hundred feet the length of St-Jacques Street, on December 11, 2008.

³⁵ Exhibit D-32.

³⁶ *9157-6561 Québec Inc. v. Eggspectations Inc.*, 2008 QCCA 2453.

2.13 The restaurant re-opens

[133] It took Mr. Bastiampillai approximately 40 days to recuperate the moveables from the City of Montreal and to reopen the restaurant for business on January 23, 2009.

[134] The evidence shows that, from this point on, the legal battle intensified and the operations of the restaurant got worse and worse and worse.

2.14 File 099

[135] On January 14, 2009, 9157 and Mr. Bastiampillai filed their introductory motion in File 099. They claimed approximately \$1.6M of damages from all of the Defendants in that file.

[136] The amounts claimed from all *Eggspectation* group of Defendants, solidarily, represent:

- a) damages for lost revenues between 2005 and 2008 due to the mismanagement of the restaurant;
- b) lost revenues for the months of December 2008 and January 2009 while the restaurant did not operate;
- c) replacement costs for equipment that was allegedly lost further to the execution of the December 9th judgement;
- d) damages for troubles, inconvenience and damage to reputation;
- e) punitive damages;
- f) amounts that were allegedly deposited into Eggspectations Inc.'s accounts for the period of July 8th to July 24, 2005;
- g) interests on Mr. Bastiampillai's personal credit card charges;
- h) penalties that would have been paid to Hydro-Québec;
- i) the costs related to the rental of chairs for the operation of the restaurant;
- j) the costs related to the loss of the chairs that were in the restaurant prior to the execution of the December 9th judgement;
- k) the replacement costs of a refrigerator.

2.15 The legal proceedings

[137] File 089, concerning the termination of the Sublease Agreement and Franchise Agreement, was fixed for a five-day hearing beginning May 17, 2011.

[138] Two months before it was to be heard, Mr. Bastiampillai made a motion to have the two cases joined.

[139] On April 4, 2011, Madame Justice Claudette Picard agreed to join the two cases. It was fixed for a 10-day hearing in January 2012.

[140] The trial had thus been postponed by some nine more months.

3. ISSUES

[141] The Court proposes to analyse the following questions of fact and law:

3.1 In File 089

- a) are the Franchise Agreement and the Sublease Agreement to be terminated?
- b) if so, what is the amount to which the Plaintiffs are entitled?
- c) is the provisional execution of the present Judgement to be ordered notwithstanding appeal?
- d) is the 48-hour delay provided by Article 565 of the *Code of Civil Procedure* to be waived?
- e) is 9157's counterclaim valid?

3.2 In File 099

- a) Should Mr. Bastiampillai's and 9157's claim be dismissed on the basis that the proceedings are improper and because of the quarrelsome conduct and bad faith of Mr. Bastiampillai?
- b) are the conclusions sought by 9157 and Mr. Bastiampillai well-founded?
- c) are the Defendants entitled to the payment of their extrajudicial fees?
- d) do ERFT and JSFT have a valid counterclaim?
- e) is the provisional execution of the present Judgement to be ordered notwithstanding appeal?

4. ARE THE FRANCHISE AGREEMENT AND THE SUBLEASE AGREEMENT TO BE TERMINATED?

[142] The right of REQI to obtain the termination of the Franchise Agreement and the Sublease Agreement is abundantly clear for the many unfortunate reasons that follow.

4.1 The Franchise Agreement

4.1.1 Non-payment pursuant to the Franchise Agreement

[143] 9157 and Mr. Bastiampillai admitted in October 2008 not having paid the royalty and marketing fees as per Sections 5.1.2 and 12.3 of the Franchise Agreement.³⁷

³⁷ Par. [3] of the safeguard order of October 16, 2008.

[144] 9157 and Mr. Bastiampillai were served with a notice of default dated June 17, 2008³⁸, and they have failed to remedy their default to date.

[145] 9157 and Mr. Bastiampillai also failed to vacate the premises after the expiry of the delay provided for in Section 19.2 of the Franchise Agreement as per the letter dated July 4, 2008 received by Mr. Bastiampillai.³⁹

[146] In light of only these financial defaults, REQI is entitled to terminate the Franchise Agreement.⁴⁰

4.1.2 The System

[147] There is, however, much more.

[148] 9157's failure to abide by the terms of the "System" as defined in Section 2.1.17 of the Franchise Agreement has been the object of serious and conclusive evidence at the hearing.

[149] Mr. Renda explained, with some passion, the *Eggspectation* concept and System. It is based on a very simple precept: "*The customer is king. He is always right!*" That is achieved by treating the staff, suppliers, banks, landlord and laws with respect. That respect creates a connection with the customer.

[150] The secret of *Eggspectation's* success is the quality and consistency of the 150 or so menu items, the freshness and quality of the food and service, from the kitchen to the front of the house. The heart and soul of the franchise is all the details that allow a customer to be served within 20 minutes of ordering, that is, all the steps required to have consistent quality products and service.

[151] Mr. Renda says that *Eggspectation's* franchisees are to serve only the best products, thereby offering a unique breakfast and lunch experience. The systematic process of how plates are put together and presented are important. Breaking down and following the whole process is key.

[152] He explains, for example, that the hollandaise sauce is made with butter and eggs only, no powder. French toasts are made with brioche bread.

[153] Respecting this system offers the best environment possible. All of this requires a lot of staff.

[154] Finally, he indicates that the Franchise Agreement was drafted from the bottom up by his attorney and friend, the late and great Mtre. Alex Konigsberg, to reflect those values and concepts.

[155] As described in detail later, the Court concludes that 9157 has systematically and continuously failed to respect the System since May of 2008.

³⁸ Exhibit P-5.

³⁹ Exhibit P-6.

⁴⁰ *Ahsan v. Second Cup Limited*, [2003] n° AZ-50168900 (C.A.), par. 28 and 30; *Thrifty Canada Ltd. v. 2630-3602 Québec Inc.*, [2004] n° AZ-50270436 (S.C.), par. 85 to 89.

In such circumstances, it is not only REQL's right but it is also its duty to ask the Court to terminate the Franchise Agreement.

[156] As Madame Justice Dionysia Zerbisias so eloquently pointed out in the case of *The Second Cub Ltd. v. Ali Ahsan*⁴¹, a franchise chain: "[...] is only as strong as its weakest link, [...]"

the banner, trademark, image, ambiance, and reputation of a franchise operation is part of its formula or system to which all franchisees subscribe and from which they derive mutual and reciprocal benefit.

[...]

[60] Where a member of the franchise chain fails to uphold the policies, standards, and operating methods and system to which all of the franchisees have subscribed by executing their franchise agreement, and upon which they all rely to advance their mutual interests, it is incumbent upon the franchisor to take measures against the infringing party to force it to cease from tarnishing the reputation of the chain and from diminishing the value of the trademark and banner. The franchisor must act to protect the integrity of the chain."

[157] The evidence of 9157's failure to respect the Franchise Agreement System is overwhelming. We will now examine 10 specific defaults, one article of the Franchise Agreement at a time.

4.1.2.1 The training

[158] The evidence shows that 9157 failed to have its operator, Mr. Bastiampillai, complete training as per Section 8.1.1 of the Franchise Agreement.

[159] Mr. Bastiampillai says that he did not complete the training because it was not provided to him.

[160] Mr. Karellopoulos, who is in charge of the training, explains that a new franchisee normally takes two months to be trained: one month on and one month off premises. Training is crucial, he says, to make sure that all operating procedures are in place and that the concept and standards are followed.

[161] Mr. Bastiampillai wanted the training to occur on the Premises because he did not have sufficient staff to absent himself. A one-month (20 days) on-site schedule was set up to accommodate him but it did not go well. He was constantly being interrupted and Mr. Bastiampillai cancelled three of the first ten training days that had been scheduled.

⁴¹ [2001] n° AZ-01021568 (S.C.).

[162] Mr. Karellopoulos asked Mr. Bastiampillai to figure out what his schedule was and to get back to him, but he never did.

[163] Mr. Renda recalls Mr. Bastiampillai telling him that he did not have time for the training. He even questioned its utility: "*who says I really need the training?*" he said.

[164] Mr. Bastiampillai denies the above testimony. He says it is Eggspectation Inc.'s fault if he did not follow the training because they never bothered to call him back. During his counter proof, he points out, however, that his duties were merely administrative. He explains that training in the kitchen was not that important for him.

[165] On the basis of this evidence, the Court is convinced that Mr. Bastiampillai did not value the merit of training and he did not respect the order of the Superior Court to complete it.

4.1.2.2 The opening hours

[166] The evidence shows that 9157 has failed to operate the restaurant during regular business hours as per Section 8.1.3 of the Franchise Agreement.

[167] Mr. Bastiampillai admits that it opens at 7:00 a.m. instead of 6:00 a.m. It has also been closed on several occasions for, among other things, lack of water caused by poor repairs, numerous cockroach and mice infestations and health and safety issues.

4.1.2.3 The laws and regulations

[168] The evidence is clear that 9157 has failed to operate the restaurant in compliance with laws contrary to what is provided in Section 8.1.4 of the Franchise Agreement.

[169] On March 17, 2009, the restaurant was inspected by police officers who seized 64 bottles without control stickers.

[170] Once is not enough. Again, on June 9th, some 45 bottles without control stickers were seized, the whole in contravention of the *Act respecting liquor permits*⁴² and the *Act respecting offences relating to alcoholic beverages*.⁴³

[171] Following a hearing held in February 2010, the *Régie des alcools, des courses et des jeux* suspended 9157's liquor permit for a period of 23 days.⁴⁴

[172] Furthermore, 9157 has been in constant violation of health and safety laws.

⁴² R.S.Q. c.P-9.1.

⁴³ R.S.Q. c.I-8.1.

⁴⁴ Exhibit P-35.

[173] Exhibit P-87 is approximately 15 millimeters thick. It makes for quite repetitive and queasy reading given all the distasteful details. It lists the infractions of 9157, starting in July 2008 until January 2012. It illustrates that this restaurant was considered a high risk to the health and safety of its clients: the Premises are dirty, food is improperly stored and bug infestations are a regular activity.

[174] In a letter of April 2011, the City of Montreal advised Mr. Bastiampillai that his restaurant had been categorized as a high risk to public health since June 2010. It pointed out that, at that date, there had been nine complaints received from the public since November 2009 and that the restaurant had been issued three different orders to close (May and July, 2010 and June 2011) for serious violations to health and safety laws.

[175] During her testimony, Mrs. Caroline Bibaud, a City of Montreal food inspector since 1986, stated that she does not recall ever seeing such an egregious offender.

[176] This is not a great badge of honor for the *Eggspectation* brand.

4.1.2.4 Financial information

[177] 9157 has not provided the financial information regarding its sales for the period of May to October 2008.

[178] The veracity of the information provided since then is highly questionable as we will see below.

4.1.2.5 Insufficient employees

[179] The evidence shows that 9157 has failed to maintain an appropriate number of employees contrary to what is required in order to operate efficiently as per Section 8.1.5 of the Franchise Agreement.

[180] The Court believes that this default is a direct cause of the breakdown of the *Eggspectation's* System.

[181] The demand letter of December 1, 2008 points out that the following points were noticed with respect to the lack of sufficient staff during the November 23, 2008's inspection:

- *"The staffing was insufficient for the amount of clientele as upon Mr. Karellopoulos' arrival, there was a lineup of guests waiting at the vestibule and when he arrived, there were plates sitting on the kitchen counter with nobody to expedite;*
- *There was no manager present at the restaurant for the greater part of the visit and there were many burnt lights throughout the restaurant."*⁴⁵

⁴⁵ Exhibit P-69.

[182] *Eggspectation's* quality assurance report of February 2009⁴⁶ indicates that there was insufficient staff in the restaurant and the mezzanine area was closed for service. It states that there were only three waiters on a Saturday and only four on a Sunday.

[183] Here is a telling description of the lack of training and the insufficiency of staff evidenced in one customer complaint:

"My family and I visited your St. Jacques St. restaurant on February 14 (Valentine's Day), 2009 for brunch. As usual there was a long line up for tables, and we waited patiently in line for what we anticipated would be an excellent brunch. We were sorely disappointed. We were shown to our table by the waiter. We ordered two coffees. They came with no milk or cream, and no teaspoon with which to stir them when the milk finally arrived. We ordered our meals (omelettes and a version of eggs Benedict). They arrived garnished with pineapple chunks that were brown and rotting around the edges. The cut fruit on the plate tasted rubbery and smelled like it had spent the night in the fridge. When I called the waiter over to point out to him that the pineapple chunks were rotten, he picked them off my plate with his hands, and took them back to the kitchen. He returned to tell me that all the pineapple looked the same, and that the chef had tasted it and it tasted fine. When I pointed out to him that it looked pretty disgusting, he just shrugged. I asked if there was a manager available, and was told that there wasn't. [...]"⁴⁷

4.1.2.6 Good order and condition

[184] The evidence shows that 9157 has failed to maintain the Premises in good order and condition as well as in a good state of repair contrary to what is provided in Section 8.1.6 of the Franchise Agreement.

[185] The Landlord's representative, Mr. Jocelyn Lafond ("**Mr. Lafond**"), testified forcefully that the operations of the restaurant and the repair of the premises were highly defective since July 2008.

[186] He describes a recurrent problem with a broken grease trap, a leaking water pipe and noxious odors emanating throughout the building and cockroach and rodent infestations.

[187] All of these problems placed the Landlord in default of its obligation to provide peaceful enjoyment to the other tenants of the building.

[188] Exhibit P-83 are a series of photographs taken in April, May and June 2010 as well as in July and October 2011. They illustrate the problem of leaking water and broken grease trap causing infiltration into the basement of the building.

⁴⁶ Exhibit P-67.

⁴⁷ Exhibit P-84.

[189] Mr. Lafond recalls his frustration and anger with Mr. Bastiampillai because he was doing nothing to correct the problems.

[190] In May 2010, the buggy that was placed by 9157 below the grease trap to capture the grease and water was emptied by 9157 in the outside lobby area of the hotel owned by the Landlord. Dark grease car tracks can clearly be seen in the pictures as they marked the granite lobby. It cost \$8,500 to repair.

[191] The Landlord also had to replace four tables of a tenant that had been damaged by the water infiltrations.

[192] 9157 has refused to pay these invoices. Mr. Bastiampillai told Mr. Lafond that he felt it was too expensive and he could not afford it. He invited him to sue, if he wanted to recover the money.

[193] Sometime in 2010, the president of the union of one of the tenants of the building (SODEC) met with Mr. Lafond to advise him that he was going to evacuate three floors of the premises if the bad odors emanating from the restaurant were not corrected.

[194] The Landlord's "*Une Adresse Classique & Professionnelle*" image for 215 St-Jacques Street West, was clearly taking a beating.

4.1.2.7 The cleanliness

[195] The facts show that 9157 has failed to maintain the highest standards of cleanliness or hygiene and sanitation contrary to what is provided in Section 8.1.7 of the Franchise Agreement and has actually put the health and safety of others at risk through its operations.

[196] There are innumerable photographs, inspection reports and consumer complaints in the various Exhibits that evidence the lack of cleanliness. Soap is in low supply in this restaurant. Food is often kept at the wrong temperature. The ventilation vents and filters for the Premises are grey with thick dust and dirt and are bent in two in order to permit air to circulate.

[197] One employee (fired a few days later) fell sick after cleaning the grease trap.

[198] One example of the dangers caused by this state of affairs will suffice. In June 2010, the City of Montreal received the following complaint:

*"Deux heures après consommation d'œufs benedicts qui étaient coulants, muffins anglais, sauce hollandaise, pommes de terre et tranches de cantaloup, elle a souffert de nausées, crampes et diarrhée, fièvre, plus de 11 jours"*⁴⁸

⁴⁸ Exhibit P-87.

[199] Several food items were sent to the laboratory for testing following that complaint. It was found in August 2010, that the famed *Eggspectation's* hollandaise sauce had a microbiologic quality that was unacceptable.⁴⁹

4.1.2.8 The suppliers

[200] The evidence establishes that 9157 has failed to maintain good relations with its suppliers contrary to what is provided for in Section 8.1.8 of the Franchise Agreement.

[201] Mr. Lafond testifies that some \$17,000 of rent has not been paid by 9157 and has filed into evidence a number of NSF cheques.⁵⁰

[202] The evidence on this issue is shockingly consistent. Mr. Bastiampillai does not like paying people. He usually argues they are too expensive or incompetent.

[203] This is such sanctimonious twaddle!

[204] A remarkable number of suppliers have had to incur legal fees to sue Mr. Bastiampillai. He has turnstiled his way through the following professionals, suppliers, service providers, among others:

- a) Mtre. François Audet, who represented Mr. Bastiampillai in the winding-up action filed an action to be paid his fees for professional services in November 2008;⁵¹
- b) Livraisons 4 Saisons Inc., the supplier of fruits and vegetable, sued in November 2008;⁵²
- c) 100777 Canada Inc. (*Frank & Dino*), the suppliers of dry goods, sued in January 2009 for unpaid supplies;⁵³
- d) Mr. James Bagiotas, the accountant of 9157, filed an action in order to be paid his fees in March 2009;⁵⁴
- e) in March 2009, Frisco International Inc. filed a motion to be paid for servicing the waffle machines. It noted in its action that it had been doing business for the past eight years without any problems until Mr. Bastiampillai took over management;⁵⁵
- f) in March 2010, Services and Support Positech, sued with respect to non-payment for the installation of hardware and software;⁵⁶

⁴⁹

Id.

⁵⁰ Exhibit P-77.

⁵¹ Exhibit P-21.

⁵² *Id.*

⁵³ Exhibit P-22.

⁵⁴ Exhibit P-20.

⁵⁵ Exhibit P-41.

⁵⁶ Exhibit P-33.

- g) in August 2010, Mtre. Joseph Ionata, 9157's attorney in File 089 and File 099 until December 2008, filed a motion to be paid his professional services;⁵⁷
- h) in February 2011, Services Instuken Ltée filed a motion to seize equipment;⁵⁸
- i) in July 2011, Enlèvement de déchets Bergeron Inc. sued 9157 for its unpaid invoices.⁵⁹

4.1.2.9 Lack of notice

[205] The evidence shows that 9157 failed to provide REQI with notices of default that it had received regarding the application of laws contrary to Section 8.1.13 of the Franchise Agreement.⁶⁰

4.1.2.10 Lack of cooperation with inspections

[206] The Court concludes that 9157 has failed to cooperate during inspections of the restaurant contrary to Section 8.1.16 of the Franchise Agreement.

[207] It is noted that Mr. Bastiampillai would not allow Mr. Karellopoulos or Mr. Skindilias to speak to the staff in the restaurant.

[208] In May 2010, Mr. Karellopoulos was asked to leave the Premises instead of inspecting them. This caused him to return in June 2010 with a bailiff. In his bailiff's report, Mr. François Taillefer, noted that Mr. Bastiampillai did not cooperate.⁶¹

4.1.3 Conclusion

[209] After this rather lengthy description, the Court holds that because of these numerous defaults, the Franchise Agreement is to be terminated.

4.2 The sublease

[210] For all the reasons stated above, the Court resiliates the Sublease Agreement.⁶²

⁵⁷ Exhibit P-65.

⁵⁸ Exhibit P-57.

⁵⁹ *Id.*

⁶⁰ Exhibit P-33, P-35 and P-87.

⁶¹ Exhibit P-46.

⁶² "**1863.** *The nonperformance of an obligation by one of the parties entitles the other party to apply for, in addition to damages, specific performance of the obligation in cases which admit of it. He may apply for the resiliation of the lease where the nonperformance causes serious injury to him or, in the case of the lease of an immovable, to the other occupants. The nonperformance also entitles the lessee to apply for a reduction of rent; where the court grants it, the lessor, upon remedying his default, is entitled to reestablish the rent for the future.*"

[211] 9157 and Mr. Bastiampillai are to vacate the Premises, failing which, they shall be evicted.

5. WHAT IS THE AMOUNT OWING AS A RESULT OF 9157'S DEFAULT?

5.1 The Sublease Agreement

[212] As of the date of the hearing, the amount of \$17,619.71 in rent is due.⁶³

[213] These amounts are payable on demand as per Section 3.5.7 of the lease agreement between Eggspectations Inc. and the Landlord.

[214] 9157 has defaulted under Section 3 of the Sublease Agreement⁶⁴ with respect to its failure to pay rent directly to the Landlord.

[215] In light of this evidence, Eggspectations Inc. is entitled to an award of unpaid rent as sublandlord of the premises in the amount of \$17,619.71.

5.2 The Franchise Agreement

[216] Under Section 5.1.2 of the Franchise Agreement, it is provided that 9157 is to pay, every week, 3% of its gross sales to REQI.⁶⁵

[217] As per the judgement of Justice Riordan, of October 16, 2008, 9157 admitted not paying the amounts due as royalty fees.⁶⁶

[218] Further to the safeguard order, 9157 deposited an amount of \$42,181.53 in a trust account managed by Gowling Lafleur Henderson, the attorneys of *Eggspectation* while awaiting a final judgement with respect to the present claim.

[219] Inasmuch as they are accurate and reliable, the weekly sales report submitted by 9157⁶⁷ demonstrate that an amount of \$98,215.50 plus taxes is due as at the date of the present judgement.⁶⁸

[220] With respect to the marketing fee of 1%, once again, 9157 admitted that no amount had been paid.

[221] As a result, based on the same weekly sales reports received from 9157 an amount of \$32,477.95 plus taxes is due to REQI with respect to marketing fees.

[222] In the aggregate, REQI is entitled to the sum of \$149,869.57.

[223] The Court reserves the right of Eggspectations Inc. and REQI to claim any further amount if it is determined that the weekly sales reports were inaccurate.

⁶³ Exhibit IN-3A.

⁶⁴ Exhibit P-4.

⁶⁵ Exhibit D-15 - This amount was agreed upon between 9157 and REQI further to an amendment to the Franchise agreement.

⁶⁶ Par. [3].

⁶⁷ Exhibits P-55, P-62 and P-63.

⁶⁸ Exhibit P-2A.

5.2.1 Return of materials

[224] REQL has requested 9157 to return all the materials pertaining to the operations of the franchise.

[225] Pursuant to Section 20 of the Franchise Agreement, such an order is granted.

6. IS THE 48-HOUR NOTICE DELAY TO BE WAIVED?

[226] Eggspectations Inc. and REQL request that the 48-hour delay provided for by Article 565 C.C.P.⁶⁹ be waived.

[227] This issue has already caused enough trouble.

[228] The Tribunal does not deem it necessary to waive this notice period. After the long passage of time, one hopes that another few legal days will not cause any harm.

7. IS THE PROVISIONAL EXECUTION OF THIS JUDGEMENT TO BE ORDERED?

[229] Eggspectations Inc. and REQL ask the Court to order the execution of the judgement notwithstanding appeal.

[230] 9157 and Mr. Bastiampillai suggest rather, that they be granted two weeks to vacate if the eviction is to be ordered.

[231] On the basis of Article 547(d) C.C.P.⁷⁰, Eggspectations Inc. is entitled to obtain the eviction of 9157 from the Premises notwithstanding appeal.

[232] What about the damages awarded hereunder?

⁶⁹ **"565.** *When a party condemned to deliver or surrender property, movable or immovable, fails to do so within the prescribed time, the plaintiff may be placed in possession in virtue of a writ ordering that the defendant be expelled or that the property be taken from him, as the case may be. In no case may a writ of expulsion be executed on a Saturday or on a non-judicial day, nor unless prior notice of at least two clear judicial days has been served on the defendant. A judge may, however, give an authorization written and signed with his own hand to disregard a requirement of this paragraph."*

⁷⁰ **"547. Notwithstanding appeal, provisional execution applies in respect of all the following matters unless, by a decision giving reasons, execution is suspended by the court:**
[...]
(d) ejection, when there is no lease or the lease has expired or has been cancelled or annulled;
[...]
In addition, the court may, upon application, order provisional execution in case of exceptional urgency or for any other reason deemed sufficient in particular where the fact of bringing the case to appeal is likely to cause serious or irreparable injury, for the whole or for part only of a judgment.
In the cases provided for in this article, the court may, upon application, make provisional execution conditional upon the furnishing of security."

[233] The abovementioned Article dictates that the Court has the discretion to order the provisional execution of the whole or a part of a judgement in cases of exceptional urgency or "*for any other reason deemed sufficient*", in particular, where the fact of bringing the case to appeal is likely to cause serious or irreparable injury.

[234] In the current case, there is no urgency. Is there some other sufficient reason?

[235] According to the author Charles Belleau, this criteria ("*other sufficient reason*") was added to the *Civil Code* in 1995 in order to enlarge the discretion of the Court in such circumstances.⁷¹

[236] In *Leboeuf v. Groupe Lavelin Inc.*⁷², the Court of Appeal outlines a number of factors that must be considered and appreciated when a Court decides whether it is appropriate to order the provisional execution of a judgement:

"D'abord, doivent être appréciées toutes les circonstances entourant le pourvoi et non uniquement la valeur des griefs d'appel, encore que cela soit un facteur important. Mais, à mon avis, l'exécution provisoire vise une situation plus large que celle prévue aux articles 497 et 501(5) C.p.c. dont l'objet est de sanctionner le pourvoi frivole et dilatoire ou qui paraît l'être. En second lieu, si la raison spéciale ne s'adresse qu'à des cas sérieux, cela ne signifie pas qu'ils doivent être exceptionnels. Toutefois, le juge ne s'écartera de la règle générale que s'il est convaincu que, sans cette mesure, tous les droits ou certains d'entre eux, acquis à l'intimé par l'effet du jugement dont on fait appel, sont (et non pourraient être) sérieusement compromis. Cette situation peut découler des agissements mêmes de l'intimé qui détourne à son profit la procédure d'appel ou simplement de facteurs résultant de la nature du recours ou des circonstances particulières de l'espèce. Enfin, troisièmement et par dessus tout, l'exercice de la discrétion judiciaire doit viser à ce que ne soit pas gravement rompu l'équilibre entre l'intérêt de l'appelant d'exercer son droit d'appel et celui de l'intimé qui bénéficie d'un jugement présumé valide. Cette notion me semble au cœur du débat et le législateur l'a bien reconnue en autorisant que l'exécution provisoire puisse être subordonnée à l'obligation, pour l'intimé en appel, de fournir caution. En somme, à plusieurs égards, cette institution offre d'importantes similitudes avec l'injonction: l'apparence de droit examinée en fonction de la valeur, prima facie, du pourvoi, le dommage et surtout la balance des inconvénients."

[our underlining]

⁷¹ Charles BELLEAU, "De l'exécution forcée des jugements – Dispositions préliminaires", in Denis FERLAND and Benoît EMERY (dir.), *Précis de procédure civile du Québec*, 4th Ed., vol. 2, Cowansville, Éditions Yvon Blais, 2003, *Droit civil en ligne* (DCL), EXB2003PPC59.

⁷² J.E. 95-607 (C.A.).

[237] In the case at hand, the Court determines that this is one of those serious circumstances that merits the required order.

[238] In doing so, the Court is mindful of the need to be fair to the Defendants and it recognizes their right to appeal this decision.

[239] Taking into consideration the conclusions of fact and law set out herein, the prejudice that will be caused by the length and passing of time of a likely appeal, the additional cost, stress and exasperation caused by such an appeal and, as explained below, the quarrelsome and abusive legal proceedings of the Defendants to date that demonstrates an attempt to defeat the ends of justice, it is appropriate to order the provisional execution of approximately half the amount awarded herein, namely the sum of \$85,000, without need to post security.

8. IS THE COUNTERCLAIM COMMENCED BY 9157 IN FILE 089 TO BE DISMISSED?

8.1 The mismanagement

[240] During his examination after plea, Mr. Bastiampillai recognized that all of the issues contained in File 089 with respect to the mismanagement of the franchise were included in his \$900,000 claim in File 099.⁷³

[241] During the trial, 9157 through its attorney and Mr. Bastiampillai recognized that the claim made in File 089 is included in the claim made in File 099. The minutes of the hearing that took place on January 18, 2012, show that both Mr. Bastiampillai and Mtre. Chi Nouako signed an admission that indicates:

"Les parties demandereses dans le dossier numéro 500-17-049674-099 admettent que la réclamation dans la défense/demande reconventionnelle dans le dossier 500-17-044682-089 est incluse dans sa réclamation dans le dossier 500-17-049674-099, de manière à ce que ladite réclamation devient sans objet dans le numéro du dossier 500-17-044682-089."

[242] On the basis of this admission, the Court dismisses the counterclaim in File 089.

8.2 The competition from Complexe Desjardins

[243] 9157 seeks \$125,000 in punitive damages because it was deprived of its right to peacefully enjoy the Premises and the franchise. It accuses REQI of bad faith because it opened a competing franchise in Complexe Desjardins, situated a kilometre or so away.

[244] The Court is of the view that 9157 renounced to this claim by the abovementioned admission of January 18, 2012.

⁷³ Examination after plea of Mr. Bastiampillai dated March 12, 2010, pages 198 at 911 to 199 at 910.

[245] Furthermore, contrary to what 9157 alleges, REQI committed no illicit act encroaching upon 9157's right to peacefully enjoy the Premises guaranteed by Article 6 of the *Quebec Charter of Human Rights and Freedoms*⁷⁴ by allowing a franchisee to open a restaurant in Complexe Desjardins.

[246] REQI committed no fault as the Franchise Agreement provides that 9157 benefits from no Protected Area⁷⁵ and Section 3.4 of the Franchise Agreement specifically provides the franchisor can compete.⁷⁶

[247] As well, the Court notes that Mr. Bastiampillai knew that a franchise restaurant at Complexe Desjardins was opening before he acquired JSFT's and ERFT's shares in April 2008.

[248] 9157 failed to prove the intent of REQI to cause it harm by moving personnel to the Complexe Desjardins' franchise.

[249] It has not proven that REQI caused the attrition of 9157's personnel.

[250] Mr. Renda indicates that Mr. Moktar, who was assistant-manager and who had been promoted to manager at 9157, actually took a pay-cut by becoming an assistant-manager at Complexe Desjardins.

[251] Contrary to what is alleged, the evidence demonstrates that the poor management of human resource issues by 9157 is the most likely cause of employee movement. Their mistreatment is amply evidenced in the numerous complaints raised before the *Commission des normes du travail* that show Mr. Bastiampillai's lack of respect for employees and labour laws.⁷⁷

[252] In an email dated January 4, 2012,⁷⁸ Mrs. Amanda Béchard ("**Mrs. Béchard**"), portrays a dictatorial and abusive Mr. Bastiampillai. He yelled at her on several occasions, took 3% of her sales and obsessively called her 11 times at home once after she hung up on him when he reneged on his promise to pay her for her training.

⁷⁴ "6. Every person has a right to the peaceful enjoyment and free disposition of his property, except to the extent provided by law."

⁷⁵ See Schedule "A" of the Franchise Agreement.

⁷⁶ "3.4 The right and license granted to Franchisee in this Agreement are non-exclusive and will not prevent Franchisor or its Affiliates from (i) themselves using the Trade Marks anywhere; (ii) establishing or operating, or granting to any individual, corporation or other entity the right and license to establish or operate restaurants using the System and the Trade Marks at any location other than within the Protected Area, (iii) selling products or services that form part of the System bearing the Trade Marks anywhere through channels of distribution dissimilar to that of restaurants forming part of the Network, or (iv) selling any products or services or establishing other businesses anywhere using other systems or trade marks."

[our underlining]

⁷⁷ Exhibits P-58, P-59 and P-60.

⁷⁸ Exhibit P-49.

[253] Finally, 9157 has adduced no evidence with respect to the amount claimed.

[254] For all these reasons, the Court dismisses this claim.

9. SHOULD THE \$2.3M CLAIM FOR DAMAGES BE DISMISSED ON THE BASIS THAT THE PROCEEDINGS ARE IMPROPER AND BECAUSE OF THE QUARRELSOME CONDUCT AND BAD FAITH OF MR. BASTIAMPILLAI?

[255] It is unusual to hear such a motion for the first time during the pleadings. After all, the evidence has been heard. One might think that - it is a bit late for that now. Yet, Article 54.1 C.C.P. does stipulate that such a decision can be made "*at any time*".

[256] The case law does not appear to provide clear examples of what to do in such circumstances.

9.1 The law

[257] Article 54.1 C.C.P. provides as follows:

"54.1 A court may, at any time, on request or even on its own initiative after having heard the parties on the point, declare an action or other pleading improper and impose a sanction on the party concerned.

The procedural impropriety may consist in a claim or pleading that is clearly unfounded, frivolous or dilatory or in conduct that is vexatious or quarrelsome. It may also consist in bad faith, in a use of procedure that is excessive or unreasonable or causes prejudice to another person, or in an attempt to defeat the ends of justice, in particular if it restricts freedom of expression in public debate."

[our underlining]

[258] The notion of procedural impropriety during proceedings has been defined as a fault committed within the course of a judicial action. Such is the case when a party to an action acts in bad faith and multiplies proceedings and uselessly and abusively pursues a judicial debate.⁷⁹

[259] In such cases, the Court has, among others, the power to dismiss the claim and award extrajudicial fees.⁸⁰

⁷⁹ Viel v. Les Entreprises Immobilières du Terroir, J.E. 2002-937 (C.A.), par. 75.

⁸⁰ *"54.3 If the court notes an improper use of procedure, it may dismiss the action or other pleading, strike out a submission or require that it be amended, terminate or refuse to allow an examination, or annul a writ of summons served on a witness. In such a case or where there appears to have been an improper use of procedure, the court may, if it considers it appropriate,*

- (1) subject the furtherance of the action or the pleading to certain conditions;*
- (2) require undertakings from the party concerned with regard to the orderly conduct of the proceeding;*
- (3) suspend the proceeding for the period it determines;*
- (4) recommend to the chief judge or chief justice that special case management be ordered; or*
- (5) order the initiator of the action or pleading to pay to the other party, under pain of dismissal of the action or pleading, a provision for the costs of the proceeding, if justified by the circumstances and if the*

[260] In the *Acadia Subaru* case, Mr. Justice Nicholas Kasirer of the Court of Appeal, reiterated the point that an abusive proceeding is one which is clearly unfounded in law such that a reasonably prudent person in the same circumstances would conclude that it is unfounded.⁸¹

[261] The terms "*attempt to defeat the ends of justice*" found in Article 54.1 C.P.C. have been described as a distortion of the judicial function or a bad faith attempt to deny the legitimate right of another person.⁸²

[262] A frivolous action has been defined as an action that has a weak or inexistent legal basis for the action taken.⁸³ It is one that offers no real chance of success and is symptomatic of the recklessness of its author.

[263] A vexatious litigant has been described as one who has a thirst for judicial proceedings, for vengeance and a desire to do harm. Such a person creates high costs for society. In such circumstances, a court is justified in putting an end to the waste of time and energy and resources that such a litigant creates.⁸⁴

[264] Professor Yves-Marie Morrisette (as he then was before his appointment as a Court of Appeal Judge) identified eight criteria of a quarrelsome litigant:

- 1.- *Le plaideur quérulent fait souvent montre d'opiniâtreté et de narcissisme;*
- 2.- *Il se manifeste plus souvent en demande qu'en défense;*
- 3.- *Il multiplie les recours vexatoires;*
- 4.- *Il réitère souvent les mêmes questions;*
- 5.- *Ses arguments de droit se signalent par leur inventivité et leur incongruité;*
- 6.- *L'échec subi par le plaideur quérulent ne constitue pas nécessairement pour lui un obstacle puisque, à plus ou moins long terme, il est incapable de payer les dépens;*

court notes that without such assistance the party's financial situation would prevent it from effectively arguing its case.

54.4 On ruling on whether an action or pleading is improper, the court may order a provision for costs to be reimbursed, condemn a party to pay, in addition to costs, damages in reparation for the prejudice suffered by another party, including the fees and extrajudicial costs incurred by that party, and, if justified by the circumstances, award punitive damages.

If the amount of the damages is not admitted or may not be established easily at the time the action or pleading is declared improper, the court may summarily rule on the amount within the time and under the conditions determined by the court."

[our underlining]

⁸¹ *Acadia Subaru v. Michaud*, 2001 QCCA 1037, par. 58.

⁸² *Id.*, par. 76; see also *Paquette v. Laurier*, 2011 QCCA 1228, par. 27.

⁸³ *Acadia Subaru*, *supra* note 81; see also *Laferrière v. Laferrière*, 2010 QCCA. 1166.

⁸⁴ *Vandal v. Vandal*, 2012 QCCA 5, par. 3.

7.- *La plupart du temps, les jugements sont portés en appel ou font l'objet de demandes de révision ou de rétractation;*

8.- *Souvent, le plaideur quérulent se représente seul.*⁸⁵

9.2 Analysis

[265] For the reasons that follow, the Court concludes that Mr. Bastiampillai presents at least half of these criteria (1, 4, 5 and 6).

[266] We will also see that he successfully manipulated the legal system in such a way that the administration of justice has not been as swift and efficient as it should be.

9.2.1 The abusive nature of 9157's proceedings and Mr. Bastiampillai quarrelsome conduct

[267] We will first examine the abusive nature of the proceedings and Mr. Bastiampillai's quarrelsome conduct.

[268] The Court notes that 9157 is claiming substantial damages with little evidence as to the quantum.

[269] The abnormally high amount of \$1.6M was increased to \$2.3M a few days before the trial. This increase represents 50% of the amount initially claimed. When considered in conjunction with other factors, this leads to a finding that the proceedings are abusive.⁸⁶

[270] 9157 and Mr. Bastiampillai are suing all of the *Eggspectation* group of Defendants for the full amount solidarily although it is admitted that some have nothing to do with the allegations.

[271] For example, Mr. Skindilias is being sued for the promise of a return on investment when he could not possibly have made such a promise. He only met Mr. Bastiampillai at the closing. In this respect, 9157 and Mr. Bastiampillai have failed to amend their claim in spite of certain admissions made by him during his cross-examination and suggestions made by the Court to do so. This is an example of the vexatious nature of the proceedings.

[272] Mr. Bastiampillai and 9157 admitted to using the legal system to extend credit terms and delay payment. They have thus admitted that they act in a dilatory manner. This is an improper use of the judicial system.

[273] The facts alleged in support of the claim of \$900,000 for mismanagement are so diffuse that it is difficult to coherently follow the syllogism which constitutes the basis of the claim. This is symptomatic of a frivolous proceeding, the vexatious nature of the proceedings, as well as quarrelsome conduct.

⁸⁵ Yves-Marie MORISSETTE, *Abus de droit, quérulence et parties non représentées*, 2003-2004, 49 R.D. McGill, p. 23; *Massé v. 3311066 Canada Inc. (Marina Centre)*, 2011 QCCS 3201, par. 189.

⁸⁶ *Acadia Subaru*, *supra* note 81, par. 89; *Laferrière*, *supra* note 83, par. 9.

[274] Furthermore, this claim and the counterclaim in File 089 essentially repeat the allegations of mismanagement of the winding-up proceedings.⁸⁷ Initially, he started winding-up proceedings with respect to 9157 without demanding condemnations of any of the Defendants.

[275] On the basis of the same mismanagement allegations, he started a counterclaim for \$125,000 in File 089 in November of 2008. There can be no link between the increase that occurred for the claim to evolve from \$125,000 to \$900,000, as the only explanation that he gave for this increase was the fact that he became a majority shareholder of 9157.

[276] This reasoning is unfounded as he was already the majority shareholder of 9157 when he initiated the counterclaim in File 089 in November of 2008.

[277] Mr. Bastiampillai's and 9157's court files, administrative files and his failure to respect judgements have led to execution measures against him in the past.⁸⁸ This element demonstrates dilatory and vexatious behavior as well as a quarrelsome conduct.

[278] He has named himself Plaintiff personally when he has no personal cause of action under the various agreements between 9157 and the members of the *Eggspectation* group of Defendants. What about his girlfriend, Mrs. Mariathas, who is also a shareholder? This is a demonstration of narcissistic behavior that characterizes quarrelsome conduct.

[279] Mr. Bastiampillai and 9157 are in poor financial state (as is evidenced by his numerous credit cards debts⁸⁹) so that any costs that may be awarded will be difficult to recover on a \$2.3M claim.

[280] After eight days of hearing, he was asked whether he would willingly acknowledge the numerous defaults, recognise the end of the Franchise Agreement and Sublease Agreement and agree to move out of the Premises, in order to shorten the trial and save expensive legal fees.

[281] His attorney responded that his client had no chance of success with respect to maintaining the Franchise Agreement on the basis of the evidence which was submitted to the Court:

"Vous pouvez être d'accord qu'il faut annuler le contrat de franchise sur la base [...] que ça affecte la marque de commerce. Je suis d'accord. C'est pour ça que je pense que dans l'un de mes [...] représentations, j'ai dit, je pense qu'on est moins ici pour se battre pour maintenir [...] le contrat de franchise que pour les autres raisons.

Quand vous lisez ma requête, c'est moins pour maintenir le contrat de franchise et puis mon client peut vous dire, moi je lui ai dit, c'est mon

⁸⁷ Exhibit P-18.

⁸⁸ Exhibits P 20, P 21, P 31, P 33, P 35 and P 87.

⁸⁹ Exhibit D-45.

*opinion, que selon moi il n'y a pas de chance que ce contrat de franchise va être maintenu sur la base de la preuve qui est faite. Pour moi [...] dans mes plaidoiries je ferai aucune plaidoirie dans le sens qu'il faut que ce soit maintenu le contrat de franchise."*⁹⁰

[282] After a night's reflection, he told the Court that he did not agree with his attorney's advice. He explained that he could not close the restaurant, otherwise:

*"I will not have any funds. I will not have my money to pay for the suppliers. I will not have my money to pay for my credit cards. There is no other income, except maybe I have to go for welfare [...]."*⁹¹

[283] He says that he wants Justice and he will wait for the judgement.

[284] Does this justify the high cost to society and to the *Eggspectation* group of Defendants of prolonging the trial into a 11th day? He is refusing to cease the operations of the restaurant, in spite of its several deficiencies, in order to continue his 2.3M\$ claim. This is symptomatic of quarrelsome conduct.

[285] 9157 and Mr. Bastiampillai have forced the *Eggspectation* group of Defendants to uselessly continue adducing lengthy evidence in order to demonstrate that in fact, the failures of 9157 to respect the Franchise Agreement, are due to Mr. Bastiampillai's mismanagement.

[286] His persistence in the continuation of proceedings is a waste of money for the taxpayers and the parties. It is also a waste of judicial resources and time that defeats the ends of justice.

[287] There is more.

[288] The evidence shows that he does not abide by the rules which are socially acceptable in our society.

[289] He has no consideration for the Landlord, REQI, the other tenants of the building, his service providers, his employees, public authorities such as the CSST and the City of Montreal inspectors, the *Régie des alcools, des courses et des jeux*, and restaurant customers. This is a demonstration of narcissism and stubbornness characterizing quarrelsome conduct.

[290] The evidence shows that 9157 and Mr. Bastiampillai have failed to respect court orders, namely:

- a) the safeguard order of October 16, 2008;
- b) 9157's undertaking before the Court of Appeal to abide by the terms of the October 16th order further to its reintegration into the Premises; and
- c) many of the final judgements rendered in favour of suppliers are not respected until execution orders are issued.

⁹⁰ Address of Mtre Olivier Chi Nouako of January 26, 2012.

⁹¹ Testimony of Mr. Bastiampillai on January 27, 2012.

[291] Although there are no systematic appeals and/or revocations by 9517 or Mr. Bastiampillai, this, nevertheless, shows a tendency to litigate further in spite of the existence of judgements akin to quarrelsome conduct.

[292] The Court also notes that he began proceedings in File 099 instead of simply amending the counterclaim in File 089. This, in turn, led to a postponement of the trial in File 089 that was initially scheduled for May 2011.

[293] As such, the decision to begin new proceedings in a separate court file when the major part of the claim concerns the execution of the December 9th judgement which occurred in File 089 and when the rest of the claim was already included in File 089, demonstrates that 9157 and Mr. Bastiampillai intended to continue operating the restaurant for as long as possible using the judicial system. This shows the dilatory and improper nature of the proceedings.

[294] 9157 and Mr. Bastiampillai, represented by the same counsel as in the present file, have accused Mr. Reginald in another court file of the same elements that they are reproaching to the *Eggspectation* group of Defendants.⁹² This is demonstrative of their tendency to multiply vexatious proceedings. It is symptomatic of quarrelsome conduct.

[295] To conclude, the Court notes the presence of a final criteria of a quarrelsome litigant. Mr. Bastiampillai expresses the belief that he is persecuted.

[296] He indicated in Court that he believes that there was a master plan in order to have him removed from the restaurant from the moment he purchased ERFT's and JSFT's shares in April 2008. As well, employees are not allowed to speak with one another or to others, as evidenced by the testimonies of Mrs. Béchard and Mr. Skindilias.⁹³ He even accused her of being a spy for *Eggspectation*.

[297] If any one was persecuted, it is the Eggspectations group of Defendants. If any one had a master plan, it was Mr. Bastiampillai.

9.2.2 9157 and Mr. Bastiampillai's bad faith and lack of credibility

9.2.2.1 Evidence of bad faith

[298] Having heard all of the evidence in this case, the Court concludes that Mr. Bastiampillai is in bad faith. The following are examples that have disconcerted the Court concerning his lack of good faith:

- a) he does not follow court orders in spite of his undertakings, namely with regard to the October 16th safeguard order as renewed by the Court of Appeal;

⁹² Exhibit P-44, par. 19.

⁹³ Exhibit P 50.

- b) he is repeat offender, whether it be employee mistreatment, the lack of repairs, leaking water and grease, liquor permit and health and safety offences;⁹⁴
- c) he has the tendency to wait for judgements to be forcibly executed without appealing instead of voluntarily complying;
- d) he mandates service providers and then systematically claims they do not do the right job or are too expensive in order to justify a refusal to pay;
- e) he sued the *Eggspectation* group of Defendants for issues that are under the control of the administration of 9157 (i.e. cancellations) as well as elements that were agreed to by the board of directors of 9157 (i.e. start up costs);
- f) he complained of 9157's mismanagement in the fall of 2005. In light of these complaints, 9157's board of directors, including Mr. Renda and Mr. Skindilias decided to change administrators on a rotational basis for periods of three months. Once his initial term came up, and after he had refused to give back the position, he decided to conduct a spot check and, lo and behold, he finds the issue of order cancellations;
- g) he blames the *Eggspectation* group of Defendants for penalties imposed upon 9157 by Hydro-Québec when in reality, 9157 was in default of payment with Hydro-Québec in August of 2008, well before the eviction;
- h) he has a practice of denying vacation pay and withholding departing employees last pay, thus taking advantage of them.⁹⁵ After admitting this is wrong, he has conducted himself in the same manner with Mrs. Béchard;
- i) he drafted a unilingual English contract of employment which notably encroaches on his employees' freedom of expression as guaranteed by the *Québec Charter of Rights and Freedoms*. You have to read this contract he entitled a "Trust Agreement and Guarantee Notice" to believe it!⁹⁶
- j) as soon as he became majority shareholder of 9157, and after he had promised to hire a manager that would be approved by ERFT and JSFT, he reneged on his word and refused to abide by his contractual obligations to give the vendors a say on who was going to manage the restaurant.⁹⁷

⁹⁴ Exhibit P 35.

⁹⁵ Exhibits P 58, P 59 and P 60.

⁹⁶ Exhibit P 50.

⁹⁷ Exhibit D-25, section 7.6.

9.2.2.2 Mr. Bastiampillai's lack of credibility

[299] To believe Mr. Bastiampillai and to find that he is telling the truth about the issues that he raises, such as, the promised return on his investment, which is the crux of his case, the Court would have to look past the numerous inconsistencies in his testimony, the vagueness on critical aspects and the outright lies on others.

[300] One of the most egregious disconnects in this Trial, is his denial of the overwhelming evidence that the restaurant was dirty and infected with cockroaches and mice. His testimony on this point is self-serving and nakedly dishonest. It appears to the Court, as if lying is like breathing for him.

[301] He is irrefragable. He told the Court that the restaurant is generally clean and that he verifies the washroom every 15 minutes or so. He even took time during his counter-proof to argue that the bailiff, an officer of the Court, who accompanied Mr. Karellopoulos in June 2010, must have been biased when he reported on its poor state and condition.

[302] This goes against the evidence from his own exterminators' reports⁹⁸, the City of Montreal inspection reports⁹⁹, the *Eggspectation* inspection reports¹⁰⁰, the numerous customer complaints¹⁰¹ and the Landlord, who have all underlined the filth, odour and greasiness of his restaurant.

[303] The following are some other examples of Mr. Bastiampillai's lack of credibility:

- a) he is suing some shareholders but not others further to the alleged mismanagement of 9157;
- b) he gave evasive testimony on the reason why JSFT and ERFT paid \$350.00 in aggregate for 350,000 shares and was also reluctant to recognize the existence of the Reginald Group, thus entailing that a series of questions needed to be posed in order to obtain the correct answer in cross-examination. He often did not recall receiving emails sent to his email address;
- c) during his testimony, he initially denied that the Landlord complained to him about odours and the grease trap problem when it is clear that they had many discussions (some of them quite heated) about these recurring problems;
- d) he tried to reproach previous management, because its weekly reports showed no cancellations, when his own weekly reports have exactly the same information given the programming of the computer

⁹⁸ Exhibit P-34.

⁹⁹ Exhibits P-33 and P-87.

¹⁰⁰ Exhibits P-46, P-67 and P-70.

¹⁰¹ Exhibit P-84.

system. He, thus, attempted to adduce misleading evidence to support his thesis;

e) he first denied having been paid while managing the restaurant from May to August 2006 only to then admit, a few questions later, that he was paid \$450.00 per week in cash;

f) he was living on social assistance, in April 2008, when he had the means to purchase the 9157's shares for some \$100,000 cash on closing;

g) Revenue Québec was forced to garnish amounts due by him further to the application of *La Loi facilitant le paiement des pensions alimentaires*;¹⁰²

h) the National Bank of Canada repossessed his house and was forced to obtain a motion in order to gain access to the property further to a final judgement in 2007;¹⁰³

i) during the trial, he failed to adequately answer the *duces tecums* that was served upon him and to respect several undertakings that were taken;

j) he fails to pay his employees in a timely manner and systematically withheld vacation pay as well as last cheques when an employee was terminated or left. A dozen or so employees filed complaints at *Commission des normes du travail* about 9157's failure to pay wages. Most of these were settled by 9157 paying amounts owed after lengthy delays, sometimes as much as a year.¹⁰⁴

k) after indicating that he does not keep any portion of the sales from waiters, he then gave evasive testimony on the percentage of sales (including taxes and tips) he keeps: 2% to the busboy, 1% to the bar (he being the barman). Eventually, during his cross examination on counter proof he admitted that he takes 3% of gross sales from waiters and confirmed that this amount coincides with the amount he is to pay under the October 16th safeguard order;

l) his credibility is tainted with his admission that his ultimate goal was to control 9157 and that the Management Agreement stood in his way;

m) he declares an annual income in the range of \$6,000. His credit cards, his ample wardrobe, his lifestyle and travel (evidenced on his credit cards) indicates otherwise; and

n) he admits that rent cheques for the Landlord were not remitted on the 1st day of the month as per the safeguard order. Rather, they were faxed to *Eggspectation* as though they had been remitted in spite of

¹⁰² Exhibit P-56 (under seal).

¹⁰³ Exhibit P 38.

¹⁰⁴ Exhibits P-50, P-58, P-59 and P-60.

numerous warnings not to do so. He has an answer for this. He says that rent cheques were faxed to *Eggspectation's* attorneys as an indication of his intention to send the rent cheques to the Landlord and that he would send them up to two weeks later to the Landlord.

9.3 Conclusion

[304] For all of these reasons, the Court concludes that 9157 and Mr. Bastiampillai's motion in File 099 is improper as it is an abusive, vexatious, frivolous and dilatory proceeding. Furthermore, Mr. Bastiampillai has shown that he is not credible. He is in bad faith and he has a quarrelsome conduct.

[305] Given the Court's conclusion, it shall dismiss the Plaintiffs' motion on this basis alone.

[306] The Defendants have asked the Court to have 9157 and Mr. Bastiampillai declared vexatious litigants. Time does not permit to do justice to this question.

[307] The Court reserves the rights of the Defendants to have Mr. Bastiampillai declared a quarrelsome litigant, should they deem this necessary in the future.

10. ARE THE DAMAGES SOUGHT BY 9157 AND MR. BASTIAMPILLAI WELL FOUNDED?

[308] Having decided that the \$2.3M claim should be dismissed on account of the improper nature of the motion and the quarrelsome conduct of the Plaintiffs, it is not normally necessary to examine the claim in detail.

[309] Given the time and effort spent during the hearing to examine each head of damage claimed, the Court will, nevertheless, address them.

10.1 Lost revenues for the months of December 2008 and January 2009

[310] 9157 and Mr. Bastiampillai seek \$244,408.50 of lost revenues for the months of December 2008 and January 2009.

[311] This claim is dismissed for the reasons that follow.

10.1.1 No fault committed in the execution of the December 9th judgement

[312] To begin, the Court concludes that the execution of Justice Gaudreau's judgement in December 2008 was not a fault.

[313] The order was presumed valid when it was executed. It was rendered notwithstanding appeal and it specifically waived the 48-hour notice provided by Article 565 C.C.P. It was strictly complied with.

[314] No opposition or application to obtain the stay of the order or an appeal was filed before or during the execution of the judgement.

[315] The *Eggspectation* group of Defendants did not abuse the rights conferred by the judgement, as they did not act in bad faith with an intent to cause injury to 9157 but rather with the legitimate intent to protect their interests and that of the franchisees.¹⁰⁵

[316] Mr. Renda quite correctly explained that the objective of the eviction was to protect the reputation of the *Eggspectation's* trademark. He says the eviction was important for them as the brand, "*built one inch at a time*", was in jeopardy. He recalls that at the time: "*every minute counted*".

[317] The Court deems that by refusing or neglecting to take possession of its property, 9157's and Mr. Bastiampillai's obstinacy caused the damages being claimed in paragraphs 22, 22.5, 22.6, 22.7, 22.8, 22.9 and 22.10 of their motion.

10.1.2 The damages claimed

[318] With respect to the specific damages of \$244,408.50 being claimed for loss of revenues during the 43 days the restaurant was closed, it is also to be dismissed for the following reasons:

- a) the amount corresponds to a loss of revenue (on which deductions must be made) and not of profit and, therefore, cannot be claimed as such;
- b) the claim is for 60 days when the restaurant was admittedly closed a total of 43 days and should have been modified accordingly but was not;
- c) the damages claimed under this head are not proven appropriately as there is no reliable, relevant or conclusive data with respect to profits that would have been made on the sales alleged.

[319] During the course of Mr. Bastiampillai's evidence he sought to introduce, his financial statements for the years in question to show his average sales.

[320] The objection to the filing of this evidence was taken under reserve by the Court and will now be dealt with.

[321] The objection is maintained. The unaudited financial statements that were provided cannot be used to confirm any lost or profit of 9157 as they are unreliable.

[322] The Court of Appeal indicates that one should be weary of such documents.¹⁰⁶ The authors Pierre Tessier and Monique Dupuis have written as follows:

"Qu'en est-il des états financiers non vérifiés ou d'une compagnie? Ils sont assimilés à du ouï-dire, en ce qu'ils sont dressés sur la seule foi des représentations de certains administrateurs ou dirigeants de la

¹⁰⁵ *Méthot v. Banque de développement du Canada*, 2006 QCCA 669, par. 12 and 13; *The Second Cup Ltd.*, supra note 40.

¹⁰⁶ *CHSLD juif de Montréal v. Entreprises Franzer Inc.*, 2008 QCCA 2402.

compagnie. Par conséquent, leur production en vue de faire la preuve, par exemple, d'une perte financière, pourra donner lieu à une objection qui sera maintenue."¹⁰⁷

[our underlining]

[323] Furthermore, the Court notes the financial statements provided are likely flawed. Mrs. Bécharde testified that while she was working in the restaurant in December 2011, approximately 75% of customers paid with credit cards, while the weekly sales reports provided by 9157 to REQI show no credit card sales for the period of February 18, 2010 until January 2012.

[324] Finally, the financial statements show the payroll declared for employees of 9157 amounted to exactly the same sum of \$40,321 in 2007, 2008, 2009 and 2010. This makes no reasonable sense and illustrates the unreliability of these documents.

10.2 Replacement costs for equipment during the eviction period

[325] 9157 and Mr. Bastiampillai seek the sum of \$142,058 that was spent to make repairs and to replace furniture that had been lost or destroyed during the eviction period.

[326] As mentioned, the Court is of the view that it is the decision taken by Mr. Bastiampillai which caused 9157's belongings to be put and left on the sidewalk.

[327] Simply put, Mr. Bastiampillai and 9157 have no one to blame for their problems but themselves as they chose not to recuperate their property upon eviction. They have failed to mitigate their damages.

[328] In that regard, the *Civil Code* stipulates: "*A person who is liable to reparation for an injury is not liable in respect of any aggravation of the injury that the victim could have avoided.*"¹⁰⁸

[329] As such, there is not, strictly speaking, a duty or an obligation to mitigate damages. Rather, mitigation is a restriction on the damages that can be recovered. Damages are to be calculated as if a plaintiff acted reasonably in order to minimize his losses.

[330] If a person takes reasonable steps, in the ordinary course of business, to reduce his losses, he is to obtain the full amount of the damages awarded.

[331] The burden is on a defendant to show that a plaintiff has failed to act reasonably to mitigate damages if he wishes to lower the amount otherwise owing.

¹⁰⁷ Pierre TESSIER et Monique DUPUIS, « Les qualités et les moyens de preuve », dans Collection de droit 2011-12, École du Barreau du Québec, vol. 2, *Preuve et procédure*, Cowansville, Éditions Yvon Blais, p. 251.

¹⁰⁸ Article 1479 C.C.Q.

[332] In the present case, the Court concludes that Mr. Bastiampillai made no effort to mitigate damages. The only thing he did was call a lawyer. Rather, in light of the circumstances, he should also have called a mover. Being traumatized is not a sufficient defence.

[333] The costs related to replacement cannot be claimed from Eggspectation group of Defendants as they are in large part a result of 9157's aggravation of damages.

[334] The Court also notes that all the furniture and equipment in the Premises were amortized and were worth only \$72,000 in 9157's unreliable financial statements. Further, not all was lost, thus, 9157's claim is grossly exaggerated.

10.3 Damages for troubles, inconvenience and damage to reputation

[335] Mr. Bastiampillai seeks the sum of \$200,000 for troubles, inconvenience and damages to reputation.

[336] The damages for troubles and inconveniences were not proven. There is, however, no doubt, that the eviction from the Premises caused troubles and inconveniences.

[337] Yet, once again, the fact that the furniture and equipment were placed on the sidewalk was the result of Mr. Bastiampillai's refusal to take possession of 9157's property.

[338] As for the allegation that Mr. Renda would have given improper information to newspapers reporters, it is denied by Mr. Renda.

[339] The Court concludes that there is no evidence that Mr. Renda made a false statement. In fact, every word he is reported to have spoken is correct, including his prediction of the legal timetable that would follow.¹⁰⁹

[340] In all events, 9157 and Mr. Bastiampillai have failed to demonstrate that this statement caused them damage to their reputation.

[341] In fact, any damage to their reputation and to the *Eggspectation's* trade name and reputation is rather a result of their gross negligence in the operation of the restaurant. The testimony found in the numerous customer complains are proof of this fact.¹¹⁰

10.4 Punitive damages

[342] 9157 and Mr. Bastiampillai are seeking \$100,000 of punitive damages.

[343] Why not \$200,000?

¹⁰⁹ "Legally, we asked the operator to come and pick up his equipment because it belongs to him. [...] He refused and he said he didn't care [...] It was either that or wait another three years in court and we didn't have an option to tell you the truth [...] We're repossessing the [...] location and we're going to reopen within the next few weeks".

¹¹⁰ Exhibit P-84.

[344] No proof was made under this head of damage and Mr. Bastiampillai's attorney indicated to the Court that he would not make any pleadings in this regard, leaving it to the discretion of the Court.

[345] There is no proof that Mr. Renda sought to damage their reputation by addressing the media.

[346] This claim is dismissed.

[347] If anybody deserved punitive damages in this case, it would have been the Eggspectation group of Defendants, but no claim was made for same.¹¹¹

10.5 Lost profits for the years 2009, 2010 and 2011 further to the execution of the December 9th judgement

[348] This claim of \$637,435 was added on January 11, 2012, five days before trial.

[349] Mr. Bastiampillai's attorney indicated in his pleading that he was willing to forego his claim for the year 2011, given the weak causal link between the claim for lost revenues in that year and the events of December 9, 2008.

[350] The claim relies on no conclusive, relevant or reliable data. The financial statements submitted for those years are unaudited. They are inadmissible as proof of their contents.

[351] It is dismissed.

10.6 Amounts that were deposited into Eggspectation Inc.'s bank account for the period of July 8th to July 24, 2005

[352] Mr. Bastiampillai and 9157 are seeking the payment of \$46,400 known as the POS claim.

[353] The Court is satisfied that there is no basis to this claim.

[354] Both Mr. Reginald and Mr. Anand testified that this amount was settled by an adjustment or credit between the parties in the fall of 2005.

[355] Furthermore, 9157 and Mr. Bastiampillai only judicially claimed this amount in January 2012. During his cross-examination, He recognized that he had knowledge of this issue in December 2008 at the latest.

[356] As a result, the right of 9157 to claim this sum, if any, is prescribed.¹¹²

[357] When the issue of prescription was raised during the pleadings, the attorney of 9157 suggested that this claim should be considered included in the \$900.000 claim for lost revenues during the period of July 2005 to April 2008.

¹¹¹ See *Carrier v. 9071-2852 Québec Inc.*, J.E. 2009 – 1831 (S.C.) (maintained by the Court of Appeal, 2010 QCCA 1720, in which a tenant was condemned to pay a landlord \$32,500 for the illegal occupation of leased premises).

¹¹² "**2925.** An action to enforce a personal right or movable real right is prescribed by three years, if the prescriptive period is not otherwise established."

[358] This is an example of a completely unrealistic argumentation that exemplifies quarrelsome conduct.

10.7 Interests on Mr. Bastiampillai's personal credit cards

[359] Mr. Bastiampillai is claiming \$35,207 representing interest charges on his eight personal credit cards.¹¹³

[360] The Court notes that he is presently using these credit cards to purchase many of the products for the restaurant given the apparent lack of sufficient cash flow to make ends meet.

[361] As a general rule, a party may not claim the interest it was charged as a result of the inability to pay amounts as these are indirect damages.¹¹⁴

[362] The evidence is not conclusive as to the amount of interest that was payable in relation to the operations of the restaurant as the interest charged applies to both personal and business expenses.

[363] Rather than explain his claim, Mr. Bastiampillai "*authorized*" the Court to arbitrate the amount by removing 20%.

[364] He has failed to minimize his damages by making minimum payments on all his credit cards, which bear interest at interest rates between 14% and 24% per annum.

[365] This claim is dismissed.

10.8 Penalties paid to Hydro-Québec

[366] 9157 and Mr. Bastiampillai are seeking the sum of \$2,847.41 of penalties they had to pay to Hydro-Québec because of the eviction of December 2008.

[367] The Court concludes that this claim is unfounded. The penalties were applied in part as a result of 9157's default to pay its Hydro-Quebec invoices in a timely manner some five months before the eviction.¹¹⁵

10.9 Further amounts being claimed

[368] 9157 and Mr. Bastiampillai are seeking \$13,950 with respect to the costs of renting chairs for the operation of the restaurant, \$28,433 to replace chairs that were lost during the eviction, and \$6,000 for the replacement costs of a refrigerator.

[369] These claims will be dismissed as no proof of same was made.

¹¹³ Exhibit D-45.

¹¹⁴ "**1607.** *The creditor is entitled to damages for bodily, moral or material injury which is an immediate and direct consequence of the debtor's default.*" [our underlining]; see *Tremblay v. Gingras*, [2002] n° AZ-02019104 (C.A.), p. 2; *Léger v. Général Accident, compagnie d'assurances*, 2006 QCCA 362, par. 8 and 10

¹¹⁵ Exhibits D-64 and D-65.

10.10 The \$900,000 claim for lost revenues between July 2005 and April 2008 given the mismanagement of the restaurant, including start-up costs, cancellation fees and the lack of return on investment

[370] The Court is satisfied that the allegations pertaining to this \$900,000 claim were the object of a settlement and can therefore not be invoked in the present proceedings.

[371] All of these issues were raised in the winding-up action taken by Mr. Bastiampillai in December 2006 after his fellow shareholders removed him from his administrative functions.

[372] The examination of Mr. Renda and Mr. Skindilias demonstrate that discussions regarding the share purchase of April 2008, included the fact that all outstanding legal claims would be settled. That is, REQI would drop its \$540,000 defamation claim against Mr. Bastiampillai. In return, he would drop the winding-up action.

[373] Mr. Bastiampillai raises an objection to this evidence pursuant to Article 2862 C.C.Q.¹¹⁶ He says the Defendants cannot make testimonial proof of the settlement.

[374] This objection was taken under reserve. It is now dismissed. The Court is satisfied that there is a commencement of proof that allows it to determine whether a transaction occurred.

[375] In a letter dated February 14, 2008, addressed by Mtre. Jean-Rémi Thibault to Mtre. Joseph Ionata, regarding settlement discussions as well as the court ledger of the file¹¹⁷, shows that the case was remitted *sine die* in order to allow the parties to negotiate a settlement.

[376] Further, in May of 2008, a declaration of settlement out-of-court was filed with respect to the defamation litigation.¹¹⁸

[377] These elements and the testimony of Messrs. Renda and Skindilias are conclusive as to the existence of a transaction between the parties pertaining to the allegations in support of the \$900,000 claim.

¹¹⁶ "2862. Proof of a juridical act may not be made, between the parties, by testimony where the value in dispute exceeds \$1,500.

However, failing proof in writing and regardless of the value in dispute, proof may be made by testimony of any juridical act where there is a commencement of proof; proof may also be made by testimony, against a person, of a juridical act carried out by him in the ordinary course of business of an enterprise."

¹¹⁷ Exhibit NB-7 of the examination on discovery of Mr. Bastiampillai of March 12, 2010, Court ledger of file 500-11-029551-062.

¹¹⁸ Exhibit NB-8 of the March 12, 2010 examination after plea of Mr. Bastiampillai.

[378] A contract of transaction¹¹⁹ may be verbal and it can be proven through testimony.¹²⁰

[379] As a result, there is the authority of a final judgement (*res judicata*)¹²¹ with respect to the allegations in support of the \$900,000 claim.¹²²

[380] The facts mentioned hereinabove are sufficient for the Court to draw the conclusion that a transaction intervened between the parties to settle all issues raised in the winding-up action. These claims cannot, therefore, be revived.

11. ARE EGGSPECTATIONS INC. AND REQI ENTITLED TO THE PAYMENT OF THEIR EXTRAJUDICIAL FEES?

[381] Eggspectations Inc. and REQI allege that 9157 and Mr. Bastiampillai's wilful breach of their contractual obligations and their abusive procedures have caused them to incur substantial legal fees.¹²³

[382] They argue that they incurred extrajudicial fees and disbursements, in the amount of \$289,418.82, without reason. They claim this amount from 9157 and Mr. Bastiampillai solidarily.

[383] The Court notes that these fees are stunningly expensive.

[384] A review of them, however, indicates that the time and effort spent on this three-year old case, are indeed reflected in these fees and disbursements.

[385] The attorneys put the full freight of their legal skills and meticulous preparation behind this case. The Court also notes that the Eggspectations group of Defendants had to incur the cost of many hours of work in search of the elusive truth given the evidence or lack thereof provided by Mr. Bastiampillai. In doing so, they made the Court's work much easier.

11.1 The law

[386] The Court of Appeal has indicated that a party that is forced to pay extrajudicial fees uselessly in order to combat the abuse committed by the opposing party is entitled to damages as there is causality between the fault committed by the abusive party and the damage suffered by its counterpart.¹²⁴

¹¹⁹ "**2633.** A transaction has, between the parties, the authority of a final judgment (*res judicata*). A transaction is not subject to compulsory execution until it is homologated."

¹²⁰ Jean-Louis BAUDOUI and Patrice DESLAURIERS, *La responsabilité civile*, 7^e éd., vol. 1, Cowansville, Éditions Yvon Blais, 2007, p. 1226, p. 1228-1828.

¹²¹ "**2848.** The authority of a final judgment (*res judicata*) is an absolute presumption; it applies only to the object of the judgment when the demand is based on the same cause and is between the same parties acting in the same qualities and the thing applied for is the same. However, a judgment deciding a class action has the authority of a final judgment in respect of the parties and the members of the group who have not excluded themselves therefrom."

¹²² *Rossbrei v. Entreprises Tisserand Inc.*, [1989] n° AZ-89011354 (C.A.), p. 3, 4.

¹²³ Exhibit P-88A.

¹²⁴ *Viel*, supra note 79, par. 79 and 84.

11.2 Analysis

[387] For the reasons given above, the Court concludes that the Defendants are entitled to claim their extrajudicial fees.

[388] The Court is satisfied that 9157 and Mr. Bastiampillai successfully used the delays inherent in the legal process to delay the termination of the Franchise Agreement and the repossession of the Premises by REQI and Eggspectations Inc.

[389] With the benefit of hindsight, one can discern the whole story that began in April 2008. A picture emerges that illustrates that at every step along the way, 9157 and Mr. Bastiampillai categorically refused to respect the Defendant's legal rights.

[390] The Court also notes that Mr. Bastiampillai has a systematic way of functioning. It is the same pattern in almost all cases taken against him. Here is a narrative of the system: (i) if you want your money, sue me; (ii) once sued, wait for the judgement; (iii) once you've had your judgement, then I will not pay the money awarded; iv) I have no need to appeal the decision; and (iv) wait for the judgement to be executed and if it's not: well, you won't get your money.

[391] There is a direct link between the abusive use of the legal procedures by 9157 and Mr. Bastiampillai and the legal fees paid by Eggspectations Inc. and REQI.

[392] As indicated above, the Court deems that Mr. Bastiampillai and 9157 have purposely abused the legal process in this case. They have acted in an improper manner with the objective of defeating "*the ends of justice*", a breach of conduct pursuant to Article 54.1 C.C.P.

[393] For all these reasons, the Court concludes that it is an appropriate redress to award Eggspectations Inc. and REQI the extrajudicial fees of \$289,418.82 that they have incurred since 2008 to ultimately obtain this judgement.

12. DO ERFT AND JSFT HAVE A VALID COUNTERCLAIM TO OBTAIN PAYMENT OF THE BALANCE OF PRICE FOR THEIR SHARES OF 9157?

[394] ERFT and JSFT are asking that Mr. Bastiampillai be ordered to pay \$55,000 to each of them with respect to the unpaid balances of sale pursuant to the agreements to purchase shares entered into in April 2008.¹²⁵

[395] As per these agreements, Mr. Bastiampillai undertook to purchase the shares of ERFT and JSFT for an aggregate amount of \$210,000.

[396] As per Sections 2.1 and 2.2 thereof, a balance of sale of \$55,000 to each of ERFT and JSFT was due 14 months from closing.

¹²⁵ Exhibits D-24 and D-25.

[397] On April 2009, ERFT and JSFT claimed the amount owing.¹²⁶

[398] Mr. Bastiampillai admitted not paying the amounts when due and that he does not intend to now. He argues that he overpaid and there are far too many irregularities.

[399] These reasons are without merit.

[400] ERFT and JSFT are entitled to the payment of \$55,000 each.

13. IS THE PROVISIONAL EXECUTION OF THE PRESENT JUDGEMENT TO BE ORDERED NOTWITHSTANDING APPEAL?

[401] The *Eggspectation* group of Defendants ask the Court to order the provisional execution of the judgement notwithstanding an eventual appeal.

[402] For the reasons mentioned hereinabove¹²⁷, the Court determines that it is appropriate to order the provisional execution of approximately half the amount awarded herein, namely the sum of \$200,000, without need to post security.

FOR THESE REASONS, THE COURT:

In file 500-17-044682-089:

[403] **GRANTS** the Plaintiffs' Re-Re-Amended Introductory Motion, in part;

[404] **DIMISSES** the Counterclaim of Defendant, with costs;

[405] **DECLARES** the Franchise Agreement between Restaurants Eggspectation Québec Inc. and 9157-6561 Québec Inc. terminated;

[406] **CONDEMNNS** 9157-6561 Québec Inc. and Mr. Newton Bastiampillai, solidarily, to pay to Restaurants Eggspectation Québec Inc. the sum of \$149,869.57 including taxes for royalty fees and advertising contributions plus interest and the additional indemnity provided for in article 1619 of the *Civil Code of Quebec* since June 17, 2008;

[407] **RESERVES** the Plaintiffs' right to claim from 9157-6561 Québec Inc. and Mr. Newton Bastiampillai, solidarily, any additional amounts that could be due as royalty fees and advertising contributions further to 9157-6561 Québec Inc.'s failure to report all sales including credit card sales for the period of October 16, 2008 to the date of termination of the Franchise Agreement;

[408] **ORDERS** that the sums held in trust further to the safeguard order rendered by the Honourable Brian Riordan. j.s.c., that has since continuously been renewed, be immediately released in favour of Plaintiffs and deducted from the amounts owing by 9157-6561 Québec Inc. to Plaintiffs;

¹²⁶ Exhibit P-76.

¹²⁷ Paragraphs [234] to [239] hereof.

[409] **ORDERS** 9157-6561 Québec Inc. to immediately cease use of trademarks TMA 467,459, TMA 449,090, TMA 557,724 and TMA 618,796 and application number 1232677, as well as designs, logos, commercial symbols, recipes, menus and all other elements of the System defined in the Franchise Agreement and the operation manual and to remove and remit to Eggspectations Inc. all elements in association thereto from the restaurant operated at 201, St-Jacques Street West, Montreal, Quebec;

[410] **CONDEMNS** 9157-6561 Québec Inc. and Mr. Newton Bastiampillai, solidarily, to pay to Eggspectations Inc. the sum of \$17,619.71 plus interest at the legal rate and the additional indemnity provided for in article 1619 of the *Civil Code of Quebec* since June 17, 2008 in respect of the rent for the Premises;

[411] **DECLARES** the Sublease Agreement between Eggspectations Inc. and 9157-6561 Québec Inc. terminated;

[412] **ORDERS** 9157-6561 Québec Inc. to vacate the subleased premises situated at 201, St-Jacques Street West, judicial district of Montreal, province of Quebec (the "**Premises**");

Should the Defendant default in vacating the Premises,

[413] **ORDERS** 9157-6561 Québec Inc. including its employees, representatives and any person under its authority to vacate the Premises without any further notice or delay;

[414] **AUTHORIZES** the execution of a writ of execution on a Saturday or any non judicial day;

[415] **AUTHORIZES** Eggspectations Inc. to change the locks of the Premises further to the approval of the Landlord-Intervenant;

[416] **ORDERS** the execution of the present judgement to evict notwithstanding appeal;

[417] **ORDERS** the provisional execution notwithstanding appeal of the payment of \$85,000 without need to post security;

[418] **THE WHOLE** with costs.

In file 500-17-049674-099:

[419] **DISMISSES** the Plaintiffs' Re-Amended Motion to institute proceedings with costs;

[420] **GRANTS** the Defendants Re-Re-Amended Plea and Cross-Suit, in part;

[421] **DECLARES** 9157-6561 Québec Inc. and Mr. Newton Bastiampillai's proceedings in the present file to be abusive, vexatious, dilatory and frivolous and that they are the result of the quarrelsomeness of 9157-6561 Québec Inc. and Mr. Newton Bastiampillai;

[422] **RESERVES** the rights of the Defendants to apply for an order to have 9157-6561 Québec Inc. and Mr. Bastiampillai declared quarrelsome litigants;

[423] **CONDEMNS** 9157-6561 Québec Inc. and Mr. Newton Bastiampillai, solidarily, to reimburse the extrajudicial fees incurred by the Defendants in the amount of \$289,418.82 without applicable taxes;

[424] **CONDEMNS** Mr. Newton Bastiampillai, to pay to the Jimmy Skindilias Family Trust, the sum of \$55 000 with legal interest plus the additional indemnity set forth at article 1619 of the *Civil Code of Quebec* as of April 17, 2009;

[425] **CONDEMNS** Mr. Newton Bastiampillai, to pay to the Enzo Renda Family Trust, the sum of \$55 000 with legal interest plus the additional indemnity set forth at article 1619 of the *Civil Code of Quebec* as of April 17th, 2009;

[426] **CONDEMNS** Mr. Newton Bastiampillai, to pay Restaurants Eggspectation Québec Inc and Eggspectations Inc., any amounts owed by 9157-6561 Québec Inc. pursuant to the Franchise Agreement and the Sublease Agreement and to abide with all orders rendered by this Court in file number 500-17-044682-089;

[427] **ORDERS** the provisional execution notwithstanding appeal of the payment of \$200,000, without need to post security;

[428] **THE WHOLE** with costs.

PAUL MAYER, J.S.C.

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Dates of hearing: January 16th through to 30, 2012 and February 3, 2012