COURT FILE NO.: 07-CV-333934CP
DATE: 20091016

ONTARIO

SUPERIOR COURT OF JUSTICE

B E T W E E N:	)	
	)	
405341 ONTARIO LIMITED	)	***Allan Dick, David Sterns*** and ***Sam Hall*** – for the Plaintiff/Moving Party
	)	
Plaintiff	)	
	)	
	)	
- and -	)	
	)	
	)	
MIDAS CANADA INC.	)	***Malcolm N. Ruby, Jeffrey P. Hoffman*** and ***Scott Kugler*** – for the Defendant/Responding Party
Defendant	)	
	)	
	)	
	)	
	)	**HEARD:** September 24, 2009

Proceeding under the *Class Proceedings Act, 1992*

REASONS FOR DECISION

CULLITY J.:

[1] For reasons released on March 26, 2009 - [2009] O. J. No. 1279 (S.C.J.) - this action was certified under the *Class Proceedings Act, 1992,* S.O. 1992, c. 6 ("CPA"). The class consists of corporations, partnerships and individuals carrying on business in Canada as franchisees on both July 11, 2003 and May 31, 2007 under franchise agreements with the defendant, Midas Canada Inc. ("Midas").

[2] Pursuant to the certification order, the claims asserted, and the common issues approved, in the litigation allege breaches by Midas of its common law duty to exercise its rights under the franchise agreement honestly, fairly and in good faith, and its duty of fair dealing under the

Arthur Wishart Act (Franchise Disclosure), 2000, S.O. 2000, c.3 (“AWA”). Damages and restitutionary remedies are claimed.

[3] The plaintiff ("405") is a class member and franchisee under a standard form franchise agreement dated August 1, 1989. The standard agreement signed by 405 and the other class members provides for a term of 20 years. It contemplates the renewal or extension of the franchises and permits assignments of the franchise agreement by the franchisee. In each of these cases - under sections 9.3 and 7.4 respectively - certain conditions are imposed. One is that the renewing, or assigning, transferee shall have executed and delivered to Midas "a general release of any claims and causes of action against Midas, its affiliated corporations, and their respective officers, agents and employees".

[4] Following certification, questions arose as to the obligation of 405 to execute a release as a condition of renewing its franchise when it expired on July 31, 2009. There was also an issue in respect of the obligation of another franchisee and class member, 1078460 Ontario Inc. ("107") to provide a release at the time of an assignment in 2007.

[5] Through its solicitor, 107 had objected to Midas' insistence on the release to the extent that it would, in its terms, cover the claims asserted in this litigation. The solicitor suggested - and Midas denied - that Midas was using its position as franchisor to withhold assent to the assignment in order to obtain a release from the claims in this proceeding. The release had ultimately been executed and, subject to exceptions that have no present relevance, it was expressed to include “all debts ... claims ... damages, suits, and causes of action of any kind, whether at law or in equity” that 107 had, or might have in the future, relating to the franchise agreement or in connection with the operation of the business of the franchise.

[6] After issues relating to the effect of the requirement for a general release as a condition of renewals, and assignments, had been raised between counsel, 405 moved for a declaration that, to the extent that the franchise agreements provided for such releases, the agreements are unenforceable with respect to some or all of the common issues set out in the certification order. The court was asked specifically to make an order prohibiting Midas from requiring 405 to execute a release of its claims in this proceeding as a condition of the renewal or transfer of its rights under the franchise agreement.

[7] The motion was opposed by Midas and, pending the hearing and after an exchange of correspondence between counsel, the parties agreed that the plaintiff's franchise agreement would be extended for 30 days after the final determination of the motion and, in effect, that the enforceability of any releases granted since certification and before such final determination should depend upon the decision of the court.

[8] The provisions of the AWA on which the plaintiff relies are as follows:

> 3. (1). Every franchise agreement imposes on each party a duty of fair dealing in its performance and enforcement.

(2) A party to a franchise agreement has a right of action for damages against another party to the franchise agreement who breaches the duty of fair dealing in the performance or enforcement of the franchise agreement.

(3) For the purpose of this section, the duty of fair dealing includes the duty to act in good faith and in accordance with reasonable commercial standards.

4. (1) A franchisee may associate with other franchisees and may form or join an organisation of franchisees.

(2) A franchisor and a franchisor's associate shall not interfere with, prohibit or restrict, by contract or otherwise, a franchisee from forming or joining an organisation of franchisees or from associating with other franchisees.

(3) A franchisor and franchisor's associate shall not, directly or indirectly, penalise, attempt to penalise or threaten to penalise a franchisee for exercising any right under this section.

(4) Any provision in a franchise agreement or other agreement relating to a franchise which purports to interfere with, prohibit or restrict a franchisee from exercising any right under this section is void.

(5). If a franchisor or franchisor's associate contravenes this section, the franchisee has a right of action for damages against the franchisor or franchisor's associate, as the case may be.

11. Any purported waiver or release by a franchisee of a right given under this Act or of an obligation or requirement imposed on a franchisor or franchisor's associate by or under this Act is void.

[9] In the submission of plaintiff's counsel, the right of association conferred by section 4 (1) includes the right to join in a class action with other franchisees in order to enforce the provisions of section 3 of the Act that impose a duty of fair dealing, or to enforce the common law requirements of good faith, fairness and honesty. It was submitted further that, as a release required by sections 7.4 and 9.3 of the franchise agreements would prevent a releasing franchisee from exercising a right to join in the present class proceeding, these provisions are void pursuant to section 4 (4) of the AWA.

[10] Independently of section 4, plaintiff's counsel submitted that the releases in question would be void pursuant to section 11 to the extent that they purport to apply to the right asserted by class members to damages for breach of the obligation of fair dealing imposed on Midas by section 3 (1).

[11] In response to the submission of plaintiff's counsel on the right of association, counsel for the defendant referred in their factum to the absence of any allegations of a breach of section 4 in the statement of claim, or any relationship between the common issues and such a right. They also referred to the lack of evidence that Midas has interfered with the right.

[12] These submissions appear to me to miss the point. The motion is concerned essentially with the scope of the class. A franchisee who provides a binding release will automatically be excluded from the class. This is a matter that relates to the requirement for certification in section 5 (1) (b) of the CPA and, like the requirements in sections 5 (1) (c) through (e), it is not a matter to be dealt with in the pleading. It follows that the effect of the AWA might properly have been raised at the hearing of the motion to certify the proceeding. The argument on behalf of the plaintiff is that the effect of an application of the provisions of section 7.4 and 9.3 of the franchise agreement that require releases falls squarely within section 4 (4) as it will prevent a franchisee from exercising its right to participate in the class action.

[13] Defendant's counsel relied on the use of the verb "purports" in section 4 (4) which they say refers to an express or implied indication of an intention to interfere with, prohibit or restrict an exercise of the right of association. In effect, I believe, they would limit section 4 (4) to provisions in a franchise agreement that profess to have such an effect.

[14] When read in its context in the statute, I believe such an interpretation of the word "purports" makes no sense. Section 4 (4) must, in my opinion, include agreements that, in the particular circumstances, have the effect of interfering or restricting the statutory right and not merely those that assert or profess an intention to do this. Whether or not the non-committal connotation of the verb "purports" may make it unnecessary to inquire into the causal effect of the agreement in some cases, it is not, in my opinion, intended to exclude agreements that actually have the effect of interfering with, or restricting, the rights conferred by section 4.

[15] I note that, while the *Shorter Oxford English Dictionary* and *Black's Law Dictionary* treat the verb "purports" as a synonym for "professes", the former also defines the "purport" of a document as its "effect, meaning, sense" and provides "has as its purport" as an alternative for the verb "purports". The reference to a "purported waiver or release" in section 11 must obviously be construed in this sense as it is clearly directed only at words or conduct that would have the effect of a waiver or release. It would be absurd to interpret the section as providing that something that professes to be a waiver or release, but does not have this effect, is void.

[16] The plaintiff's submissions on the effect of section 4 were premised on the proposition that the right to associate conferred by the section extends to the right to join in a class action with other franchisees against the franchisor. The validity of this proposition was raised in argument but left open by Perell J. in *2038724 Ontario Ltd., v. Quiznos Canada Restaurant Corporation* (2008), 89 O.R.(3d) 252 (S.C.J.), at para 66.

[17] Although defendant's counsel were critical of the plaintiff's reliance on cases under section 2 (d) of the *Canadian Charter of Rights and Freedoms* for this purpose, I am of the opinion that, when read in its context in the AWA, the right of association in section 4 does encompass the right of franchisees to participate in a class action for the purpose of enforcing their rights against the franchisor under the statute or otherwise. Section 4 is not concerned with the right to associate socially or recreationally. Its inclusion in the statute would be inexplicable if it was not intended to permit franchisees to associate for the purpose of protecting their interests and enforcing their rights through collective action.

[18] While I accept the submission of defendant's counsel that the authorities under the *Charter* are not directly in point, the following statement of Bastarache J. in *Dunmore v. Ontario (Attorney General),* [2001] 3 S.C.R. 1016, at para 16, is in my respectful opinion equally applicable to the position of franchisees under the AWA:

> [I]ndividuals associate not simply because there is strength in numbers, but because communities can embody objectives that individuals cannot. For example, a "majority view" cannot be expressed by a lone individual, but a group of individuals can form a constituency and distil their views into a single platform. Indeed, this is the essential purpose of joining a political party, participating in a class action or certifying a trade union.

[19] So, too, are the comments of Winkler J. in *1176560 Ontario Limited v. The Great Atlantic and Pacific Company of Canada Limited* (2002), 62 O.R. (3d) 535 (S.C.J.) (*"A & P"*), affd., (2004), 70 O.R. (3d) 182 (Div. Ct.):

> Vulnerable franchisees may not be in a position to bring individual actions. (para 33)
>
> Further, these are exactly the type of plaintiffs that may be required to prosecute a class action lawsuit in the context of a franchise relationship, with the inherent vulnerability in the dependent ongoing nature of the relationship between franchisor and franchisee. (para 41)

[20] Apart from the arguments I have rejected, the principal response of defendant's counsel to the plaintiff's reliance on section 4 (4) of the AWA was essentially the same as their submissions on the effect of section 11. These sections, they assert, could not have been intended to apply to agreements, and releases, in the circumstances under consideration where the franchisees voluntarily decide to seek a renewal, or effect an assignment, of their franchise agreements. Counsel stressed that such decisions are made entirely without any coercion or pressure by Midas and that Midas is merely insisting - as it has always done in the past - that, when exercising rights under the agreement, the franchisees, as well as Midas, should comply with the terms they had previously accepted.

[21] I do not accept these submissions. Franchise agreements are contracts of adhesion and it has been recognized judicially on a number of occasions that the provisions of the AWA are intended to mitigate and alleviate the power imbalance that exists between franchisors and franchisees: see, in particular, *Shelanu Inc., v. Print Three Franchising Corp.* (2003), 64 O.R. (3d) 533 (C.A.), at paras 58 and 66; *Personal Service Coffee Corp. v. Beer* (2005), 256 D.L.R. (4th) 466 (Ont. C.A.), at para 28; *A & P*, at paras 41-42.

[22] It is unquestionable that the provisions and the intentions reflected in such agreements are subject to the overriding provisions of the AWA. In consequence, the fact that Midas is seeking compliance with the agreements is beside the point. If the agreements interfere with the right of association conferred by section 4 (1), they will be void to that extent. If they require releases of rights under the statute, the releases would be void and the relevant provisions of the agreement will be unenforceable. I see no difference in principle between this case and any other in which a franchise agreement contains offers of benefits to franchisees conditional on the execution of releases of their rights to fair dealing under the AWA, or their rights to damages for a breach of the franchisor's obligations under the statute. It would defeat the purpose of the statute if the obligation of fair dealing could be bargained away by such provisions of standard-form franchise agreements - whether or not an enquiry would be permitted into the fairness of the bargain.

[23] In the context of section 11, defendant's counsel submitted that such a broad proposition as that just stated must be qualified by a recognition that franchisees, like other litigants, must be entitled to settle their claims against franchisors and, in so doing, to provide releases of them. For this purpose, counsel relied heavily on the decision of Cumming J. in *1518628 Ontario Inc., v. Tutor Time Learning Centers LLC*, [2006] O.J. No. 301 (S.C.J.) ("*Tutor Time*"), where it was held that section 11 did not apply to

> ... a release given (with the advice of counsel) by a franchisee in the settlement of the dispute for existing, known breaches of the Act by the franchiser in respect of its disclosure obligations, which would otherwise entitle the franchisee to a statutory rescission (at para 108)

[24] In *Tutor Time* there is no doubt that the release was given for the purpose of an agreement that the franchisee intended to be a settlement of its claims based on the provisions of the AWA. The franchisee subsequently purported to resile from the settlement agreement and, for that purpose, to rely on section 11. The learned judge held (at para106) that "parties who reach a settlement are to be held to their bargain" and that section 11 was inapplicable in such circumstances. My understanding of the reasoning of Cumming J. is that, if there was settlement that would otherwise be binding, section 11 would not apply to a release given pursuant to it.

[25] I do not accept that this is a case that falls within the ratio of *Tutor Time*. The plaintiff is not engaged in settling its claims. On the contrary, this motion is made precisely because it wishes to continue to assert them. The issue is whether in order to obtain benefits under the terms of a franchise agreement, it can be compelled contractually to release rights that it has under the

AWA. While the overriding effects of the AWA are not limited to cases where franchisors are relying on, and attempting to enforce, provisions of a franchise agreement, there is no doubt that the statute can apply to such cases.

[26] At times the submissions of defendant's counsel suggested to me that they were seeking to treat any release of an existing claim as a settlement and, in consequence, as falling within the ratio of *Tutor Time*. I do not believe this to be a correct interpretation of the decision. Its acceptance would effectively emasculate section 11 of the AWA. It would, in effect, limit the operation of the section to cases where the release covered only claims that might arise in the future. I find nothing in the words of section 11 that would support such a narrow interpretation and the general objectives of the statute are inimical to it.

[27] There may be cases in which the distinction is difficult to draw, but I decline to find that the prerequisite of a settlement has been satisfied here where the question is whether the franchisor can enforce the provisions of the franchise agreements dealing with renewals and assignments by insisting on the execution of a release by an unwilling franchisee. Such a release would not be given in connection with the settlement of claims asserted in this proceeding, and *Tutor Time* is, in my opinion, properly distinguishable on that ground.

[28] In my judgment, if the exercise of a franchisee's rights under a franchise agreement requires a release of rights given by the AWA, the release will, at least *prima facie,* be void by virtue of section 11. I say *"prima facie"* in order to leave open the possibility of cases such as *Tutor Time,* or other circumstances in which it would be inequitable to permit a franchisee to rely on that provisions of section 11. In this case, the fact that the franchisee is under no obligation to exercise the rights under the agreement appears to me to be of no relevance. The case is one where the franchisor is attempting to require the execution of a release that would deprive the franchisees of their rights under the Act. In the absence of any circumstances that should exclude an application of section 11, I am satisfied that such a release would be void and that, in consequence, the agreement to provide it is unenforceable. In my opinion, the agreement is also void pursuant to section 4 (4) of the AWA.

[29] Although the great majority of the Midas shops are in Ontario, there are also franchises operated in Alberta, British Columbia, Manitoba, New Brunswick and Nova Scotia. Section 2 of the AWA provides that the Act applies to franchise agreements entered into or renewed on or after the coming into force of the section - and that sections 3, 4 and 11 apply to those entered into previously - if the business of the franchise is operated wholly or partly in Ontario.

[30] Defendant's counsel submitted that it follows that, even if the court would grant the motion in respect of franchises operated in Ontario, franchise businesses operating elsewhere in Canada would not be affected.

[31] In response, plaintiff's counsel relied on section 10.11 of the franchise agreements.

> 10.11. **Controlling Law.** This Agreement, including all matters relating to the validity, construction, performance, and enforcement thereof, shall be governed by the laws of the Province of Ontario.

[32] In their submission, the issues raised in this motion relate to the validity and enforcement of the franchise agreements and, in consequence, are to be governed by the laws of Ontario including the provisions of the AWA. As the evident intention was that one system of law should apply to all Midas franchises in Canada, it was submitted that section 10.11 must be read as subjecting those outside Ontario to provisions of the AWA in the same manner, and to the same extent, as franchises of businesses operated in this Province.

[33] Counsel for the defendant accepted that, despite the territorial limitation contained in section 2 of the AWA, there was nothing to prevent the parties from agreeing that the provisions of the statute - including section 11 - would govern the validity and enforcement of franchise agreements applicable to franchises operated elsewhere in Canada. Counsel submitted, however, that such an intention cannot properly be inferred from the provisions of section 10.11 of the franchise agreements. While the laws of Ontario referred to in the section would include the provisions of statutes of Ontario, counsel submitted that the intention must, *prima facie*, be to include all of the provisions of such statutes including the territorial limitations in section 2 of the AWA. In consequence, on this approach, section 11 could have no application to franchises operated entirely outside the Province.

[34] As counsel recognized, the issue relates to the intention of the parties as reflected in section 10.11 of the franchise agreement and does not give rise to any questions of legislative intention or legislative competence**.** Although I find it difficult to believe that analogous questions have not arisen in other cases, no authorities that bear on the choice between the opposing views were cited by counsel. In these circumstances, I prefer the interpretation of section 10.11 supported by plaintiff's counsel.

[35] I believe the most reasonable inference is that, by agreeing that the laws of Ontario are to govern the validity, construction, performance and enforcement of a franchise agreement applicable to franchises operating in another province, the intention of the parties was that their rights and obligations - including the reciprocal and inviolable rights and duties of fair dealing - are to be the same as if the business of the franchise was operated in Ontario. The territorial limitations in section 2 of the AWA have, in my opinion, no more effect for this purpose than that of the general presumption that statutes are not “intended to apply extraterritorially to persons, things or events outside the boundaries of the enacting jurisdiction” (*Sullivan on the Construction of Statutes*, (5^{th} edition), page 731).

[36] Accordingly, I find that the validity and enforceability of the impugned provisions of the franchise agreements are governed by the overriding provisions of sections 4 and 11 of the AWA irrespective of the location of the Midas franchises in Canada.

[37] I note, also, that, to the extent that issues may arise because of choice of law restrictions in provisions of the *Franchises Act*, R.S.A. 2003, c. F - 23, section 7 of the statute includes an obligation of fair dealing in every franchise agreement and section 18 contains a provision equivalent to section 11 of the AWA. As a breach of the obligation would be a breach of contract, I am not persuaded by the submission of defendant's counsel that it is significant that the statute does not expressly confer a right to damages in respect of the breach.

[38] In view of the above, the plaintiff is, in my judgment, entitled to an order substantially in the form requested in paragraph 1 of the notice of motion, as well as the order requested in paragraph 2 thereof. The order in paragraph 1 will be reformulated as follows:

> An order declaring that any provision contained in the Midas Franchise and Trade-Mark Agreement (the "Agreement") requiring franchisees to release the defendant from liability as a condition for the renewal or transfer of their rights under the Agreement is unenforceable and void for the purposes of this proceeding.

[39] If the parties are unable to agree on the costs of the motion, the plaintiff's submissions should be made in writing within 14 days of the release of these reasons and the defendant will have a further 10 days in which to respond.

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CULLITY J.

Released: October 16, 2009

COURT FILE NO.: 07-CV-333934CP
DATE: 20091016

ONTARIO

SUPERIOR COURT OF JUSTICE

B E T W E E N:

405341 ONTARIO LIMITED

Plaintiff

- and -

MIDAS CANADA INC.

Defendant

REASONS FOR DECISION

CULLITY J.

Released: October 16, 2009