CITATION: TA & K Enterprises Inc. v. Suncor Energy Products Inc., 2011 ONCA 613
DATE: 20110927
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COURT OF APPEAL FOR ONTARIO

Goudge, MacFarland and Watt JJ.A.

BETWEEN

T A & K Enterprises Inc.

Plaintiff (Appellant)

and

Suncor Energy Products Inc. and Suncor Energy Inc.

Defendants (Respondents)

David Sterns and Allan D. J. Dick, for the appellant

Larry P. Lowenstein, Jean-Marc Leclerc and Adam Hirsh, for the respondents

Heard: June 13, 2011

On appeal from the judgment of Justice Paul Perell of the Superior Court of Justice, dated December 17, 2010, with reasons reported at (2010), 78 B.L.R. (4th) 70 (Ont.).

Goudge J.A.:

INTRODUCTION

[1] T A & K Enterprises Inc. (TAK) operated a gas station under a franchise agreement with Suncor Energy Products Inc. (Suncor). The issue in this appeal is whether Suncor was exempted from the obligation created by the *Arthur Wishart Act* (*Franchise Disclosure*), *2000*, S.O. 2000 (the Act) to provide a disclosure statement to TAK before it signed that agreement. The primary exemption relied on by Suncor is s. 5(7)(g)(ii) of the Act which applies to excuse the franchisor where "the franchise agreement is not valid for longer than one year and does not involve the payment of a non-refundable franchise fee".

[2] Perell J. granted Suncor's motion for summary judgment. TAK appeals. As I explain, I agree with the motion judge. I would therefore dismiss the appeal.

THE FACTS

[3] The essential facts are not disputed. It is agreed, that for the purposes of the Act, Suncor is a franchisor, TAK is a franchisee, and the Retail Franchise Agreement (RFA) they signed on November 11, 2008 is a franchise agreement. The term of the RFA was one year, commencing on November 15, 2008 and ending on November 14, 2009. TAK acknowledged that Suncor's franchise agreements were generally for one year, with no option to renew at the end of that year; that Suncor and its franchisees often enter into the new franchise agreements; that franchisees had no right to insist that the new agreements

contained the same terms; and that in fact the franchise agreements often did change from year to year.

[4] On August 1, 2009, Suncor's parent company, Suncor Energy Inc., merged with Petro Canada. One consequence was that Suncor was required by the Commissioner of Competition to divest a number of gas stations. As a result, Suncor wrote to TAK in October 2009 to advise that when the RFA expired in November 2009, there would be an extension of the RFA on a month-to-month basis on the same terms and conditions.

[5] On January 12, 2010, Suncor wrote again to advise that the RFA would terminate on August 12, 2010.

[6] Prior to the RFA being signed, Suncor had not provided a disclosure statement to TAK. On January 18, 2010, TAK purported to exercise the right of rescission given by the Act to a franchisee whose franchisor had not provided it with a disclosure statement as required by that Act. On the same day, TAK commenced a proposed class action alleging the right to rescind on this basis, and claiming the refund provided by the Act to those entitled to rescind. This led to Suncor's motion for summary judgment seeking to dismiss the action, because no disclosure document was required.

THE LEGISLATION

[7] A number of sections of the Act are relevant. The franchisor's obligation to provide a disclosure document to a prospective franchisee is set out in s. 5(1):

> 5.(1)A franchisor shall provide a prospective franchisee with a disclosure document and the prospective franchisee shall receive the disclosure document not less than 14 days before the earlier of,
>
> > (a) the signing by the prospective franchisee of the franchise agreement or any other agreement relating to the franchise; and
> >
> > (b) the payment of any consideration by or on behalf of the prospective franchisee to the franchisor or franchisor's associate relating to the franchise. 2000, c. 3, s. 5 (1).

[8] Section 5(4) specifies the information that the disclosure document must contain, such as material facts as prescribed by regulation and financial statements.

[9] Section 5(7) sets out the circumstances in which a franchisor is exempted from these obligations. Section 5(7)(g)(ii) is at stake in this appeal:

> 5.(7) This section does not apply to,...
>
> > (g) the grant of a franchise if,...
> >
> > > (ii) the franchise agreement is not valid for longer than one year and does not involve the payment of a non-refundable franchise fee...

[10] Section 6(2) gives the franchisee the right to rescind the franchise agreement if the franchisor never provided the disclosure document. Section 6(6) then provides various rights accruing to the rescinding franchisee, including the right to receive from the franchisor a refund of any monies paid, other than for inventory, supplies or equipment.

[11] Section 12 puts the burden of proof on a franchisor seeking to invoke an exemption:

> 12. In any proceeding under this Act, the burden of proving an exemption or an exclusion from a requirement or provision is on the person claiming it. 2000, c. 3, s. 12.

THE DECISION APPEALED FROM

[12] The motion judge found that the exemption provided in s. 5(7)(g)(ii) applied to relieve Suncor of the obligation to provide TAK with a disclosure document. He concluded that both requirements of that exemption were met.

[13] First, the RFA was not valid for longer than one year, since its term was November 15, 2008 to November 14, 2009 and that was the period during which the parties had rights and obligations. He found that the potential availability as of November 11, 2008 (when the RFA was signed) of a cause of action for anticipatory breach did not extend or enlarge those rights. Nor was his conclusion undermined by the possibility that, at the end of the term, the RFA could be extended, since that would make it impossible to know before the RFA was signed whether a disclosure document was required, something which was clearly inconsistent with the logic of the section.

[14] Second, the RFA did not involve the payment of a non-refundable franchise fee but rather payment of royalties for the sale of Suncor products. The motion judge held that a franchise fee is not a royalty but a payment to obtain the right to purchase and operate a franchise in a franchise chain, or in other words "a fee paid for the right to be a member of the franchise chain": *TA & K Enterprises Inc. v. Suncor Energy Products Inc.* (2010), 78 B.L.R. (4th) 70 (Ont. S.C.), at para. 61.

ANALYSIS

[15] TAK attacks both these conclusions of the motion judge and argues that Suncor met neither requirement of s. 5(7)(g)(ii).

[16] To begin with the first requirement, TAK argues that the motion judge erred in finding that the RFA was not valid for more than a year. It says that there are a number of ways in which the RFA must be considered to have been valid for more than a year.

[17] First, TAK argues that even though its term was only one year, the RFA was signed on November 11, 2008 and bound the parties at least until the term ended on November 14, 2009, a period of more than one year.

[18] I disagree that this takes it outside the exemption. I agree with the motion judge that the legislative purpose underpinning the first requirement is to protect franchisees by ensuring they receive a disclosure document before committing to a franchise agreement, unless the period during which they will be shouldering rights and obligations is of short enough duration that they are at minimal risk. The Act fixes it at one year or less. In this case, the term of the RFA is one year. That is the time frame during which the franchisee is bound to certain rights and obligations. It is thus the time frame during which the franchise agreement is valid for the purposes of the exemption.

[19] TAK seems to agree with this approach when it acknowledges that the exemption was clearly intended to exempt franchises of short duration such as concession at an annual three-week fall fair. Where the franchise agreement is signed more than a year

before such a fair, the exemption would be preserved because the term of the contract would only be three weeks, the duration of the fair. The exemption turns on that term.

[20] TAK also makes much of the right of either party to sue for anticipatory breach of contract once the contract is signed, even before its term begins. Again I agree with the motion judge that the availability of this cause of action is different from what the exemption is driving at, namely the duration of the rights and obligations under the contract. Professor John D. McCamus offers this useful insight in his book, *The Law of Contracts* (Toronto: Irwin Law, 2005), at pp. 651-52:

> [I]t is well established that where the innocent party elects to disaffirm the contract on the basis of an anticipatory repudiation, the innocent party may immediately commence an action for breach. The innocent party need not postpone the commencement of such an action until the date for performance has arrived. Although this proposition is often referred to as the doctrine of anticipatory *breach*, it has frequently been observed that it is difficult to see how one could breach an obligation prior to the date for performance. Accordingly, anticipatory *repudiation* is perhaps a more felicitous description of the factual phenomenon.

[21] TAK argues that a second way in which the RFA remained valid for more than a year is that both the indemnity provisions and the confidentiality provisions in the RFA are explicitly said to survive the termination or expiration of the RFA. In my view the answer to this argument is that both sets of provisions provide for their continuation only if the franchise agreement has been terminated or expired. The survival of these provisions does not extend the franchise agreement itself. An agreement that has been terminated or expired cannot be considered valid.

[22] Third, TAK says that the existence of s. 50.2 in the RFA means that the RFA cannot be considered to have had a duration of only one year. That section provides that if the franchisee remains in possession of the premises after the expiry of the term of the agreement and continues to pay a monthly rent, the tenancy becomes one of month-to-month, subject to the terms of the RFA. However this section does not extend the RFA. It simply turns the tenancy into a monthly one. It creates no more than the possibility of the franchisee becoming an over-holding tenant at the end of the RFA. If that possibility does not occur, it cannot possibly be argued that the RFA is extended. The presence in the RFA of a section that merely creates the possibility of a month-to-month tenancy after the RFA expires cannot be taken to extend it.

[23] Lastly, TAK argues that the Suncor letter of October 2009 indicating that when the RFA expired on November 14, 2009 Suncor would extend it on a month-to-month basis made the RFA valid beyond its expiry period. In my view, this letter simply creates new monthly agreements following the expiration of the RFA. It does not stretch the RFA into a longer franchise agreement. Moreover, TAK's argument is contrary to the scheme of s. 5 of the Act. That scheme requires that the existence of the franchisor's obligation to provide a disclosure document (or the franchisor's exemption therefrom) be known with certainty before the RFA is signed or consideration paid to the franchisor. Section 5 is unworkable if the obligation can be triggered after the fact by a letter sent some 11 months later.

[24] In summary, I would reject the arguments put forward by TAK to treat the RFA as valid for more than one year. I would conclude that the RFA meets the first requirement of s. 5(7)(g)(ii) of the Act.

[25] The second requirement of the exemption is that the franchise agreement does not involve the payment of a non-refundable franchise fee. The Act does not define "franchise fee". TAK says that the motion judge erred in finding that the RFA met this requirement. It argues that payments for intangibles, such as royalties (which the RFA does provide for) must be considered franchise fees, thereby taking the RFA out of the exemption. It looks for support to the French version of the Act which uses the phrase "redevances de franchisage non remboursables". TAK translates "redevances" as any amount required to be paid at fixed intervals. This would include royalties, as well as many other payments.

[26] I would reject TAK's argument. It seeks to use the French version of the Act by focusing only on "redevances", thereby taking in any payments required to be paid by the franchisee at fixed times, including rent. This would effectively prevent any franchise agreement from meeting this requirement, which cannot have been the legislative intent. In my view, the full phrase "redevances de franchisage non remboursables" does not take us beyond the phrase in the English version, namely "franchise fee", and is of no assistance to TAK.

[27] A better guide is provided by the regulation to the Act. Section 6 of Ontario Regulation 581/00 sets out what a disclosure document must include. One item is a list of all the franchisee's costs "associated with the establishment of the franchise, including the amount of any deposits or franchise fees". In addition, the "Report of the Minister's Committee on Franchising" (1971) by S.G.M. Grange, Q.C., prepared for the Department of Financial and Commercial Affairs of Ontario, which was a seminal document underlying the Act, expressly distinguished between franchise fees and royalties. The same distinction has been made by cases in this court such as *Country Style Food Services Inc. v. 1304271 Ontario Ltd.* (2005), 200 O.C.A. 172 (C.A.). Taking these considerations together, I agree with the motion judge that a franchise fee is in the nature of a fee paid for the right to become a franchisee. It does not include royalties or payments for goods and services. The RFA does not therefore involve a payment of a non-refundable franchise fee and thus meets the second requirement of s. 5(7)(g)(ii) of the Act.

[28] I would therefore conclude that the RFA fits within the exemption provided by s. 5(7)(g)(ii). Suncor had no obligation to provide TAK with a disclosure document.

[29] In light of this conclusion, it is unnecessary to consider Suncor's alternative argument that the exemption found in s. 5(7)(f) is also available to it.

[30] For all these reasons I would dismiss the appeal. Suncor is entitled to its costs on a partial indemnity basis which I would fix at $20,000 inclusive of disbursements and applicable taxes.

RELEASED: SEP 27 2011

I agree.

I agree