CITATION: 1680960 Ontario Inc. v. Print Three Franchising Corporation, 2018 ONSC 1192
COURT FILE NO.: CV-16-560778
DATE: 20180514

SUPERIOR COURT OF JUSTICE – ONTARIO

RE: 1680960 Ontario Inc., Carmen Burchesin and Sorin Burchesin, Plaintiffs

AND:

Print Three Franchising Corporation, Print Three Ltd., Canadian Network Franchising International Ltd., Andrew Hrywnak and Esther Willinger, Defendants

BEFORE: Pollak J.

COUNSEL: *Michael A. Kleinman*, for the Plaintiffs

Jason P. Mangano, for the Defendants

HEARD: February 16, 2018

ENDORSEMENT

[1] On this motion for summary judgment, 1680960 Ontario Inc., Carmen Burchesin and Sorin Burchesin ("the Plaintiffs"), ask for:

(i) a declaration that the franchise agreement dated April 21, 2016 and ancillary agreements entered into relating to the franchise (collectively, the "Franchise Documentation") were validly rescinded under the provisions of the *Arthur Wishart Act (Franchise Disclosure)*, 2000, S.O. 2000, c. 3 ("*Act*").

(ii) payment from the Franchisor and those persons identified under the Act as "franchisor associates," being the Defendants Print Three Ltd., Andrew Hrywnak ("Andrew") the president of both corporate Defendants, and Esther Willinger ("Esther"), for rescission damages under the Act in the amount of $228,611.83. The Plaintiffs have discontinued against Canadian Network Franchising International Ltd.

[2] This Action was originally commenced by a Notice of Application and converted into an Action. The parties agree that the Plaintiffs' claim is for a 2 year statutory rescission right per s. 6(2) of the *Act*.

[3] If a franchise agreement is properly rescinded, then pursuant to s. 6(4) of the *Act*, the franchisor must:

(a) refund all of the money received from the franchisee, other than for inventory, supplies or equipment;

(b) purchase the franchisee's remaining inventory,

(c) purchase the supplies or equipment that the franchisee had purchased, and;

(d) compensate the franchisee for any losses it sustained in acquiring, setting up and operating the franchise, less the amounts set out above.

[4] The Plaintiffs submit that this Action is appropriate for Summary Judgment because it deals with the legal interpretation of the *Act*. They argue that the issue is whether the Franchisor complied with its obligations to make full disclosure, pursuant to the *Act*.

[5] The Defendants plead in the Statement of Defence that all material documentation was given to the Plaintiffs before the closing of the transaction.

[6] The Plaintiffs argue that *Raibex Canada Ltd. v. ASWR Franchising Corp.*, 2018 ONCA 62, does not overrule the decision in *6792341 Canada Inc. v. Dollar It Limited*, 2009 ONCA 385, 95 O.R. (3d) 291, which they submit is still applicable.

[7] In *Raibex*, the Ontario Court of Appeal analyzed and summarized the applicable provisions of the *Act* giving this court a framework of analysis that is of great assistance to the determination of this Action:

> [40] ... To justify rescission in these circumstances, the Franchisee must not only demonstrate that the FDD was deficient, but also show that it was so deficient that the Franchisor effectively "never provided [a] disclosure document."
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> [41] Assuming, without deciding, that the FDD did not comply with s. 5, I conclude that the deficiencies the Franchisee complains of, viewed individually or collectively, are not so serious that the FDD is tantamount to a complete lack of disclosure. It follows that the Franchisee was not entitled to rescind the franchise agreement under s. 6(2).
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> [43] First, under s. 6(1), a franchisee may rescind a franchise agreement within 60 days of receipt of the disclosure document if the document is not provided "within the time required by s. 5 or if [its] contents ... did not meet the requirements of [s. 5]." Section 6(1) is not relevant to this appeal, as the Franchisee did not provide a notice of rescission within sixty days of receiving the FDD.
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> [44] Second, under s. 6(2), a franchisee may rescind a franchise agreement within two years of entering into the agreement if the franchisor "never provided the disclosure document."
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> [45] **This court has had several opportunities to interpret s. 6(2) of the *AWA*. Two guiding principles have emerged.**

[46] **On one hand, a franchisor's failure to comply with s. 5 of the *AWA* does not always provide sufficient grounds for rescission under s. 6(2): Imvescor, at para. 43; Vijh v. Mediterranean Franchise Inc., 2012 ONSC 3845 (CanLII), at para. 6, aff'd 2013 ONCA 698 (CanLII). A franchisee that receives imperfect disclosure does not necessarily stand in the same position as a franchisee that was "never provided [with a] disclosure document." In Imvescor, at para. 37, this court warned that conflating those two scenarios would frustrate clear legislative intent:**

> **The [*AWA*] ... is clear that a rescission remedy is available to the franchisee in two separate situations, and that the two situations are not to be blurred into one. This interpretation is further bolstered by the purpose of the Act, which is in part to ensure that the franchisee has at least fourteen days to review a disclosure document before signing an agreement. The legislature clearly chose to reserve the two year remedy for instances of a complete failure to provide a disclosure document. [Emphasis Added].**

[47] **On the other hand, a purported "disclosure document" may be so deficient as to effectively amount to a complete lack of disclosure, thereby permitting rescission under s. 6(2). As MacFarland J.A. observed at para. 74 of 6792341 Canada Inc. v. Dollar It Ltd., 2009 ONCA 385 (CanLII), 95 O.R. (3d) 291: "[a] document does not become a disclosure document for the purposes of the [*AWA*] just because it is called a disclosure document. Put another way, calling something a disclosure document does not make it one."**

[48] Whether deficiencies in a disclosure document are so serious as to amount to no disclosure for the purposes of the *AWA* must be determined on the facts of each case: Dollar It, at para. 78. The necessary degree of deficiency has been described in several ways, including "materially deficient" (Mendoza v. Active Tire & Auto Inc., 2017 ONCA 471 (CanLII), 414 D.L.R. (4th) 676, at para. 19; Imvescor, at para. 43; 2240802 Ontario Inc. v. Springdale Pizza Depot Ltd., 2015 ONCA 236 (CanLII), 331 O.A.C. 282, at para. 51), "serious non-compliance" (Mendoza, at para. 37), "fundamentally inadequate and deficient disclosure" (2212886 Ontario Inc. v. Obsidian Group Inc., 2017 ONSC 1643 (CanLII), 67 B.LR. (5th) 103, at para. 27), and "stark and material deficiencies" (Dollar It, at para. 74).

[49] **Whatever terminology is employed, the inquiry into whether disclosure deficiencies are such that they justify rescission under s. 6(2) ultimately focuses on whether the franchisee has been "effectively deprived ... of the opportunity to make an informed [investment] decision":** Caffé Demetre Franchising Corp. v. 2249027 Ontario Inc., 2015 ONCA 258 (CanLII), 125 O.R. (3d) 498, at para. 63. In my view, the seriousness of any given failure to comply with s. 5 must be measured by reference to the underlying purposes of s. 5 and the *AWA* more broadly: to "obligate a franchisor to make full and accurate

disclosure to a potential franchisee so that the latter can make a properly informed decision about whether or not to invest in a franchise": 1490664 Ontario Ltd. v. Dig This Garden Retailers Ltd., 2005 CanLII 25181 (ON CA), 256 D.L.R. (4th) 451 (Ont. C.A.), at para. 16 (emphasis added); Dollar It, at para. 16; Mendoza, at para. 14. For example, this court found that the disclosure document in Dollar It amounted to a complete lack of disclosure because there was "simply no way anyone reviewing [the] document could make an informed decision about whether or not to invest in th[e] franchise": Dollar It, at para. 68.

[52] Turning first to the head lease, the motion judge's failure to consider the terms of the parties' franchise agreement within her s. 6(2) analysis constitutes an extricable error of law, justifying appellate intervention. **As noted above, whether a breach of s. 5 is sufficiently serious to engage s. 6(2) should be determined on a case-by-case basis, with a view to all relevant circumstances bearing on whether the franchisee can make a properly informed decision about whether or not to invest. This inquiry requires, where appropriate, taking into account the terms of the parties' franchise agreement.**

[53] In this case, all parties involved knew the proposed franchise's location had not been selected, and agreed that the Franchisor and the Franchisee would work collaboratively to select a site. This commitment was formally incorporated into the franchise agreement through a clause requiring the parties to exercise "reasonable best efforts" in selecting a location. The "best efforts" clause contemplated the Franchisee's active participation in the selection of the premises to which the head lease would apply, and constrained the Franchisor's ability to enter into a lease without considering the Franchisee's legitimate interests. These protections were bolstered by the opt-out clause in the franchise agreement. Had the Franchisee found the prepaid rent requirement to be too onerous or the location otherwise unsuitable, rather than urge the Franchisor (as it did) to accept the deposit term and sign the lease, it could have rejected the location and either searched for another site, or elected to receive its money back.

[54] These safeguards, in my view, provide a complete answer to the complaint that the Franchisor's failure to disclose the head lease justified rescission under s. 6(2). **The absence of that information had little impact on the Franchisee's ability to make an informed investment decision. The site selection and opt-out clauses also distinguish this appeal from Dollar It, another case where a franchise disclosure document failed to provide terms of a head lease.** The franchise agreement in Dollar It did not include a collaborative site selection clause or provide the franchisee with any "opt-out" rights if a satisfactory location could not be found. Moreover, the disclosure document in Dollar It included far more serious deficiencies: it failed to provide the Franchisee with financial statements, a signed director's certificate, or a description of the licenses required to operate the franchise, in addition to five other omissions: see Dollar It, at paras. 21, 33, 40, 46-47.

[56] The Franchisee submits that the Franchisor had prior experiences with conversions, and should have disclosed those costs in the FDD. Even accepting that argument, given the wide variance in the costs associated with the Franchisor's three prior conversions, **I do not believe disclosing those figures would have significantly improved the Franchisee's ability to make an informed investment decision.** Further, the FDD provided detailed cost estimates for construction from a shell, and presented a "conversion" as a development strategy offering potential savings over that model. While the Franchisor acknowledged that it had "no reasonable means" of predicting the extent of those savings, the shell cost estimates nonetheless provided the Franchisee with a useful reference point against which to measure the upper range of possible costs associated with a conversion. The shell cost estimates, as noted earlier, accurately reflected the Franchisee's actual costs in constructing the franchise outlet.

[57] **For these reasons, even if the above-mentioned omissions amounted to breaches of s. 5, the motion judge's conclusion that the FDD amounted to "no disclosure at all" cannot withstand scrutiny. As I have noted, the *AWA* draws a clear distinction between imperfect disclosure and situations where a franchisor provides "no disclosure", thereby entitling the franchisee to rescission within a two year window. In my respectful view, the motion judge erred in law by failing to give effect to this important legislative distinction.**

[Emphasis Added]

[8] The Defendants submit that in accordance with the above-noted principles, this Court must determine whether the Plaintiffs "had the opportunity to make an informed business decision to purchase the franchise." The Defendants argue that the evidentiary record is that the Plaintiffs did not rely on any of the documentation provided by Print Three other than the store financials and only for their determination of the appropriate prices they offered for the franchise.

[9] The Plaintiffs argument is that on the basis of the alleged breaches of the *Act* with respect to disclosure obligations by the Defendants, their claim has been proven. They seek to rely on other cases wherein the court has determined, for example, that the failure to provide a head lease was enough to deprive a purchaser from the opportunity to make an informed decision and therefore entitling the purchaser to rescission under the *Act*.

[10] The parties agree on the following facts:

- Feb. 20/16 – ad placed by PIVA, for sale of commerce court and royal bank franchises, ad says franchises" are generating a profit of $175K and had combined sales of approximately $750K.

- March 2/2016 Meeting with Burchesins and Andrew Hrywnak, Andrew provides Burchesins with disclosure document (Tab B of Document 1) Andrew provides list of customers (Tab 4 Document 2)

- Disclosure Document – does not contain:

  (i) Head lease or amending agreement

  (ii) Agreement of purchase and sale

  (iii) Revenue table (Tab 5 Doc 1.2)

  (iv) Aboriginal financial statements

- Disclosure document was generic not SIP specific for sale of new store
- Without departing clients revenue is decreased by 40-50%
- April 5, 2016 parties execute agreement of purchase and sale (Document 1, Exhibit I)
- Agreement of purchase and sale is executed by Print Three and plaintiffs
- Entire proceed of sale of franchise went to Print Three to pay off outstanding royalties
- Head lease and amending agreement sent to former counsel of the Plaintiffs on April 19, 2016 (after APA executed). Counsel sends head lease to Plaintiffs on May 11, 2016
- Purchase completed May 2, 2016
- June 24, 2016 Notice of Recision received (64 days after purchase).

[11] The parties have agreed to certain amounts of damages.

[12] The Defendants argue that before signing the Franchise Agreement on April 21, 2016, the Plaintiffs or their legal counsel had been given:

- an adequate disclosure document, corporate and store financials, and Customer List on March 2, 2016;
- a Revenue Table detailing the Commerce Court's Aboriginal and non-Aboriginal revenue and a monthly Expense List detailing the Commerce Court store's expenses on March 23, 2016;
- the asset purchase agreement, which had an opt-out clause, and the Commerce Court store head lease on April 19, 2016; and
- the head lease amending agreement was provided to legal counsel for the Plaintiffs on April 20, 2016.

[13] The following evidence is in dispute:

- Whether the Plaintiffs met with Bruno Piva before March 2, 2016 and whether he provided a copy of the Aboriginal Statements at that time;
- Whether the Plaintiffs had discussions with Steve Bolduc between March 2 and March 23 during which they discussed stores financials;
- Whether the revenue table (Tab 5 Document 1.2) was provided on March 23, 2016 (Defendants' position) or on May 3, 2016 (Plaintiffs' position);

[14] The Defendants submit that this case is very fact specific and cannot be resolved on this motion for summary judgment because of the conflicts in the following evidence:

(i) Whether the Burchesins were provided hard copies Commerce Court store financials in February of 2016 from Piva;

(ii) Whether certain information was known but not provided to the Plaintiffs on March 2, 2016;

(iii) What was and was not in the Disclosure Document;

(iv) Whether the Plaintiffs were provided a copy of the Original Lease and Amending Agreement for the Commerce Court location as well as the Amending Agreement extending the term of the Lease prior to the close of the sale transaction;

(v) Whether the Plaintiffs were provided a copy of the Revenue Table as soon after it was available to Print Three on March 23, 2016;

(vi) Whether the historical Expense List was provided to the Plaintiffs on March 23, 2016 the day it was received by Print Three;

(vii) Whether the Plaintiffs were made aware the Commerce Court store was owned by Aboriginal in March of 2016;

(viii) Whether the Plaintiffs were told why Mr. Bolduc wanted to sell the Commerce Court store;

(ix) Whether Print Three was aware of the percentage of Mr. Bolduc's aboriginal work on March 2, 2016;

(x) Whether the Plaintiffs had several discussions with Mr. Bolduc about the Commerce Court store's financial prior to March 23, 2016;

(xi) Whether the Plaintiffs had suffered a loss with respect to the RCAP Leasing agreement, Xerox Canada Limited.

[15] The Defendants submit that the Plaintiffs were not deprived of the opportunity to make an "informed business decision" but did not want to operate the business.

[16] Both parties rely on the case of *Hryniak v. Mauldin*, 2014 SCC 7, [2014] 1 S.C.R. 87, wherein the Supreme Court of Canada gave us a roadmap of the approach to follow on a motion for summary judgment, as follows:

> On a motion for summary judgment under Rule 20.04, the judge should first determine if there is a genuine issue requiring trial based only on the evidence before her, without using the new fact-finding powers. There will be no genuine issue requiring a trial if the summary judgment process provides her with the evidence required to fairly and justly adjudicate the dispute and is a timely, affordable and proportionate procedure, under Rule 20.04(2)(a).
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> If there appears to be a genuine issue requiring a trial, she should then determine if the need for a trial can be avoided by using the new powers under Rules 20.04(2.1) and (2.2). She may, at her discretion, use those powers, provided that their use is not against the interest of justice. Their use will not be against the interest of justice if they will lead to a fair and just result and will serve the goals of timeliness, affordability and proportionality in light of the litigation as a whole.

[17] As well, the Ontario Court of Appeal held in *Baywood Homes Partnership v. Haditaghi*, 2014 ONCA 450, 120 O.R. (3d) 438, at paras. 35 and 37, the advisability of a staged summary judgment process should be assessed in the context of the litigation as a whole. The Court noted that in a staged summary judgment process there was a risk that a trial judge would develop a fuller appreciation of the relationships and the transactional context than the motion judge, which can force a trial decision that would be implicitly inconsistent with the motion judge's finding, even though the parties would be bound by that finding. This process, in such context, would risk inconsistent findings and substantive injustice. At paras. 44-45 the court stated:

> Evidence by affidavit, prepared by a party's legal counsel, which may include voluminous exhibits, can obscure the affiant's authentic voice. This makes the motion judge's task of assessing credibility and reliability especially difficult in a summary judgment and mini-trial context. Great care must be taken by the motion judge to ensure that decontextualized affidavit and transcript evidence does not become the means by which substantive unfairness enters, in a way that would not likely occur in a full trial where the trial judge sees and hears it all.
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> Judges are aware that the process of preparing summary judgment motion materials and cross-examinations, with or without a mini-trial, will not necessarily provide savings over an ordinary discovery and trial process, and might not "serve the goals of timeliness, affordability and proportionality" (*Hryniak* at para. 66). Lawyer time is expensive, whether it is spent in court or in lengthy and nuanced drafting sessions. I note that sometimes, as in this case, it will simply not be possible to salvage something dispositive from an expensive and time-consuming, but eventually abortive, summary judgment process. That is the risk, and is

consequently the difficult nettle that motion judges must be prepared to grasp, if the summary judgment process is to operate fairly.

[18] The Defendants submit that the Plaintiffs have not discharged their heavy burden of establishing that the disclosure deficiency must be so "egregious" that that it amounted to no disclosure at all. They submit that if the alleged deficiencies result in imperfect disclosure, the rescission remedy under section 6(2) is not available. In this regard, they rely on the case of *2189205 Ontario Inc. v. Springdale Pizza Depot Ltd.*, 2011 ONCA 467, 283 O.A.C. 55, at para. 48.

[19] However, the main defence of the defendants is that the plaintiffs did not place any reliance on any of the materials they allege should have been provided to them.

[20] They refer to Ms. Burchesin's evidence that she did not rely on the Disclosure Document prior to making an offer to purchase the Commerce Court franchise. There is no evidence she read the Disclosure Document. At her cross examination she indicated her offer for the franchise was based exclusively on the financial statements, Network Franchise International's advertisement and her visual walkthrough of the Commerce Court store.

[21] The plaintiffs dispute this allegation and state that the plaintiffs also relied on assurances from Andrew Hrywnak when formulating then purchase price. In particular, Ms. Burchesin relied on Mr. Hrywnak's assurances that he would do his best to ensure there were no problems with the Burchesins acquiring the Royal Bank site.

[22] The evidentiary record has potential material facts that are in dispute. Credibility assessments are required to decide these conflicts.

(i) **Whether Mr. Hrywnak was in possession of the revenue table on March 2, 2016**: The Plaintiffs assert that the revenue table was created before February 3, 2016, and emailed to Mr. Hrywnak, based on email records. The Defendants claim that the information was available only on March 23, 2016, when Mr. Bolduc provided it to Mr. Hrywnak. Specifically, Mr. Hrywnak has asserted that he did not have information upon which to advise the percentage of Mr. Bolduc's work that was from Aboriginal clients.

(ii) **When the Plaintiffs received the revenue table and expense list**: The Plaintiffs argue that they received the revenue table on May 3, 2016, based on Ms. Burchesin's affidavit evidence, and an email exchange between Ms. Burchesin and Mr. Hrywnak. The Defendants rely on Mr. Hrywnak's evidence to assert that they provided the revenue table to the Plaintiffs on March 23.

(iii) **Whether the Plaintiffs were informed of the true reason why Mr. Bolduc was selling the stores**: The Plaintiffs assert that Mr. Bolduc was selling the stores to pay down his arrears, and that the Plaintiffs were not informed of this. The Defendants assert that Mr. Bolduc's sale of the stores was unrelated to any outstanding royalties, and that his indebtedness was unrelated to the health of the stores. This assertion is based on the evidence of Andrew Hrywnak.

(iv) **The nature of the Nordstrom deal (and its impact on damages)**: The Defendants assert that Mr. Hrywnak advised the Plaintiffs that Nordstrom was a large new account and offered to make Commerce Court one of the few stores in the Print Three network to work on the account, but the Plaintiffs did not want to take on the work. The Plaintiffs argue that this offer was only made to placate the Plaintiffs, and in any event they considered it in good faith, but it was not economically viable.

(v) **Whether Mr. Bolduc discussed his store's financials with the Plaintiffs between March 2 and March 23, 2016**: The Defendants assert, based on Mr. Bolduc's evidence, that he spoke with the Plaintiffs about the financials. The Plaintiffs question Mr. Bolduc's credibility on this point, arguing that he contradicts himself on significant aspects of those conversations.

[23] In accordance with the decision in the *Raibex* case, it is clear that the facts of this case are very important for the Courts' determination of "whether the plaintiffs have been deprived of an opportunity to make an informed decision on their purchase." That is the main issue for the Court to determine.

[24] Applying the Supreme Court of Canada's roadmap referred to above, as well as recent Court of Appeal decisions, I must ask myself the following:

(i) On the basis of the evidentiary record alone, are there genuine issues that require a trial?

(ii) Does the evidentiary record in front of me provide me with the evidence I need to "fairly and justly adjudicate the dispute"?

[25] On this motion, I do not think the evidentiary record before me provides me with the necessary evidence to fairly and justly adjudicate the issue because of the conflicts in the evidence I have referred to above. There are genuine issues that require a trial. I cannot find that I am in a position to fairly adjudicate this dispute. The main issue for the court to resolve is whether the Plaintiffs have been "effectively deprived of opportunity to make informed investment decision."

[26] I must consider "if the need for a trial can be avoided by using the new powers under Rules 20.04(2.1) and (2.2)." I may, in my discretion, use those powers, provided that their use is not against the interest of justice. Their use will not be against the interest of justice if they will lead to a fair and just result and will serve the goals of timeliness, affordability and proportionality in light of the litigation as a whole.

[27] As directed by the Supreme Court of Canada, I have considered whether it would be possible to resolve the conflicts in the evidence to enable this court to arrive at a fair and just decision. I am of the view that it would not be advisable to conduct such a "mini trial" as too much of the critical evidence with respect to the relevant issue in this case is in dispute.

[28] I therefore find that for this reason this motion for summary judgement must be dismissed.

[29] In my view, this is an appropriate case for me to follow the Supreme Court's direction and seize myself of the matter as the trial judge. I must, however, qualify this to recognize the practical reality of our court's ability to schedule trials in a timely and expeditious manner. I will not be seized of this trial if the effect of my unavailability would be to delay the hearing of the trial between the parties. If it is possible to do so without adverse delay or consequences to the parties, I seize myself of the trial of this matter as directed by the Supreme Court of Canada.

Costs

[30] If the parties are unable to agree on costs, they may make brief written submissions to me no longer than three pages in length. The Plaintiffs' submissions are to be delivered by 12:00 p.m. on May 23, 2018, and the Defendants' submissions are to be delivered by 12:00 p.m. on May 30, 2018. Any reply submissions are to be delivered by 12:00 p.m. on June 7, 2018.

Pollak J.

Date: May 14, 2018