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Dial-a-Franchise: Fyfe v Vardy confirms case law on what constitutes a “franchise”

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In *Fyfe v. Vardy (cob Dial-a-Bottle)*, a recent summary judgment decision of the Ontario Superior Court, the plaintiffs sought rescission of an agreement under subsection 6(2) of the *Arthur Wishart Act (Franchise Disclosure), 2000* (the *AWA*) on the basis that no disclosure was provided by the defendant. The plaintiffs also sought damages for misrepresentation based on financial projections provided by the defendants in pre-contractual communications. While the case hinged on whether the business relationship between the parties constituted a “franchise” relationship as defined under the *AWA*, the Court also touched more generally on the use of disclaimers in financial representations.

Factual background

As the Court described it, the Dial-a-Bottle business is effectively a “call service” for alcohol purchases and delivery. The defendant receives calls from customers at a central call centre and forwards the requests to the Dial-a-Bottle operator in the caller’s territory. The operator then purchases the requested alcohol and delivers it to the customer.

Prior to entering into any contract, the defendant sent the plaintiffs a “Financial Model” that provided a “worst-case” sales forecast and an email with explicit financial predictions for territories in the Toronto area. The Financial Model contained a general disclaimer that stated Dial-a-Bottle “makes no guarantees in income since each owner is in control of their own business.” No other disclosure was provided.

In May of 2015, the plaintiffs decided to become Dial-a-Bottle operators. The plaintiffs and the defendant entered into an “Exclusivity Agreement” that provided the Plaintiffs with the right to operate a Dial-A-Bottle business in two specified geographic areas. The Exclusivity Agreement explicitly stated that the plaintiffs were not purchasing a franchise. In addition to an initial purchase price of $40,000, the plaintiffs would pay a $3 “management charge” to the defendant for every completed order. The Agreement also provided that the defendant would have considerable involvement in the plaintiffs’ business, including taking all orders, marketing the business and managing much of the day-to-day operations.

After a year of unsuccessful operations, the plaintiffs claimed rescission of the agreement based on the defendant’s failure to provide a franchise disclosure document. The plaintiffs also claimed damages for misrepresentation in the defendant’s pre-contractual communications.

The defendant did not dispute the lack of disclosure but took the position that the agreement was not a franchise agreement such that no disclosure was required. The defendant also alleged that there were no misrepresentations because the Financial Model

disclaimed any promises or guarantees, and the financial predictions in the pre-contractual email were only for Toronto areas (and thus did not apply to the plaintiffs' territories of Richmond Hill/Thornhill and Aurora/Newmarket).

Decision of the Ontario Superior Court

The Court found partial summary judgment in favour of the plaintiffs, granting rescission of the Exclusivity Agreement and damages for failure to disclose under the *AWA*. However, certain damages claimed by the plaintiffs were not adequately evidenced and could not be granted unless pursued further in a full trial. The plaintiffs' claim for misrepresentation was dismissed.

Rescission

As a first step in the analysis, the Court had to decide if the relationship between the parties constituted a franchise relationship. The court evaluated whether the relationship met the three elements of a "franchise" under the *AWA*: (i) the franchisee is required to make a payment or continuing payments to the franchisor in the course of operating the business (or as a condition of acquiring the business); (ii) the franchisee is granted the right to sell or distribute goods or services that are substantially associated with the franchisor's marks, trade name or advertising; and (iii) the franchisor exercises significant control over, or offers significant assistance in, the franchisee's method of operation.

Following prior case law, the Court disregarded the explicit statement in the Exclusivity Agreement that the relationship did not constitute a franchise. The Court then had little trouble finding that the relationship met the legislative definition: the initial purchase price and the ongoing management charge were sufficient payments to meet the first requirement of the test; the plaintiffs were clearly using the defendant's trademark by operating as "Dial-a-Bottle Richmond Hill"; and the defendant had significant control over the important aspects of the plaintiffs' business, including managing all aspects of order-taking and marketing. The Court held that the arrangement between the parties was a franchise relationship and, because no disclosure was provided, the plaintiffs were entitled to rescind the contract.

As a result, the plaintiffs were entitled to a refund of their initial purchase price of $40,000 along with any "management charge" payments made to the franchisor. However, the plaintiffs did not provide any calculations or evidence of the management charges, so they did not receive any refund of these ongoing payments.

Interestingly, instead of simply calculating losses under subsection 6(2)(d) of the *AWA* in connection with the plaintiff's rescission remedy, the Court then moved to section 7 (statutory damages for failure to disclose or a deficiency or misrepresentation in a disclosure document) to assess the rest of the claimed damages. As no disclosure document had been provided, the defendant had failed to disclose the imposition of fines from the Canadian Radio-television and Telecommunications Commission relating to violations of the Unsolicited Telecommunications Rules under the *Telecommunications Act*. The Court accepted the plaintiffs' evidence that they would not have signed the Exclusivity Agreement if they had known of the violations.

The Court thus awarded $50,000 in damages to compensate for one of the plaintiffs who quit his job as a property manager in order to focus on the Dial-a-Bottle business, along with approximately $5,000 in moving expenses incurred when the plaintiffs uprooted to Richmond Hill to operate the business. A further $30,000 in operating expenses and losses were claimed but not properly evidenced before the Court. The Court left open the option for

the plaintiffs to pursue further damages in a full trial.

Misrepresentation

The Court dismissed the plaintiffs' claim for damages for misrepresentation related to the financial information provided by the defendant. The Court held that the disclaimer in the Financial Model was sufficient and that it was clear that the financial predictions in the pre-contractual email did not apply to the plaintiffs' territories.

Key takeaways

This decision is an important reminder that businesses should be aware of the possibility that they are unintentionally operating a franchise. This is an extension of well-established jurisprudence from cases like *Chavdarova* and *Grill It Up*: the courts will examine the substance of a relationship regardless of explicit statements in the contracts characterizing the arrangement.

From a disclosure perspective, this case is also a reminder that disclaimers are an important addition to any representations that may not apply to a particular franchisee. However, be aware that the misrepresentation analysis in the decision is very limited and was arguably unnecessary, as rescission had already been found. *Fyfe v. Vardy* adds to the growing case law on "accidental" franchises and the Court's analysis of various types of business relationships.