Franchisor-friendly motions results (British Columbia and Manitoba)

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Recent summary judgment decisions in Manitoba and British Columba affirm two key principles. First, while the definition of "franchise" is broad, it has been interpreted to exclude situations where the alleged franchisor did not provide significant assistance to the alleged franchisee. Second, the courts have continued to affirm the principle that parties who agree on the terms of a termination will generally be held to those agreements, and a refusal to extend time for performance on its own will not constitute bad faith. Franchisors who act reasonably and keep careful documentation will continue to have an advantage in either of these situations.

"Significant assistance" a crucial aspect of the franchise relationship – *Diduck v Simpson*, 2018 MBQB 76

In 2015, Robert Diduck entered into a distributor agreement with Narol Professional Services Ltd., which identified itself as the "master distributor" of Sure Step Distributorship Program. Sure Step is a product manufactured by Interlake Chemicals International Limited. Upon entering into the distributor agreement, Diduck paid $24,750, was assigned an exclusive sales territory and provided with some training.

The business relationship did not go well. Diduck sued Narol and Interlake for breach of the distributor agreement, negligent misrepresentation and a franchise claim.

Diduck sought summary judgment against the defendants on the ground that the distributor agreement was, in fact and law, a franchise agreement, and that Interlake failed to provide him with the required disclosure documents under the *Franchises Act* (Manitoba). Accordingly, Diduck purported to have rescinded the agreement. In response, Interlake sought summary judgment on the basis that Diduck's negligent misrepresentation claim must fail.

The Court dismissed Diduck's motion, finding that, although certain aspects of the definition of "franchise" were met, the company did not offer significant assistance in Diduck's method of operation under a business plan, nor did it provide location assistance. In determining whether the distribution agreement was a "franchise agreement," the Court relied heavily on the Canadian Franchise Guide. Even though Diduck was assigned an exclusive territory and was provided with some cursory training (factors in favour), the Court held that this did not amount to the provision of "significant assistance" required by the *Franchises Act* (Manitoba), nor did assigning him a sales territory did not amount to "location assistance."

The Court also dismissed Diduck's negligent misrepresentation claim, finding that he failed to establish a genuine issue for trial. As argued by Interlake, the Court held that the alleged misrepresentations were essentially projections, forecasts, or statements of opinion about the profitability of the Sure Step Distributorship Program. This decision affirms that pro forma projections of profit based on anticipated sales are not statements of fact and cannot serve as the basis for a claim of negligent misrepresentation.

Parties held to cancellation and release agreement – *526901 BC Ltd v Dairy Queen Canada Inc.*, 2018 BCSC 1092

In this case, the British Columbia Supreme Court refused to relieve the plaintiffs from performance under a Mutual Cancellation and Release Agreement (Release Agreement), which they had entered into willingly. A very similar Release Agreement was previously considered by the BC Court of Appeal, and commented on here.

Pursuant to a 1999 Dairy Queen Operating Agreement (Operating Agreement), the plaintiffs possessed a licence to operate a Dairy Queen franchise in Vancouver. Following a number of defaults, on November 28, 2017, the parties entered into the Release Agreement pursuant to which the plaintiffs were given until December 31, 2017 to cure all of the defaults. If the defaults were not cured, the plaintiffs would be given six months within which to sell the store's business assets, failing which the Operating Agreement would be terminated on June 30, 2018.

The defaults were not cured by December 31, 2017, and the business was not sold. The plaintiffs commenced an action claiming that Dairy Queen could not terminate the Operating Agreement, and filed an application for an interlocutory injunction restraining Dairy Queen from terminating or cancelling the Operating Agreement until trial of the action. Dairy Queen cross-applied for a declaration that the Operating Agreement was terminated as of June 30, 2018, and an interlocutory and/or permanent injunction restraining the Plaintiffs' "anticipated breach" of the Release Agreement and continued operation of any Dairy Queen-related business at their premises following June 30, 2018.

In support of their injunction application, the plaintiffs argued that (i) they had substantially cured certain defaults and diligently pursued other cures, and that, accordingly, Dairy Queen lacked "good cause for termination"; and (ii) Dairy Queen was bound by duties of fair dealing and to act in good faith and in accordance with reasonable commercial standards, which precluded it from relying upon the terms of the Release Agreement in the circumstances.

The Plaintiffs failed all three parts of the interlocutory injunction test (which is rare) and the application was dismissed. In so doing, the Court concluded: (i) the Plaintiff did not have a "strong prima facie case," and there was no "serious question to be tried," because the parties did not dispute the enforceability of the Release Agreement; (ii) Dairy Queen had not acted in bad faith by refusing further extensions of time after a mutually stipulated termination had occurred; (iii) there was insufficient evidence of irreparable harm to the Plaintiff which could not be adequately compensated in damages; and (iv) the balance of convenience did not support granting an injunction. Importantly, the Court considered the fact that the plaintiffs did not come to Court with "clean hands," finding that they had a history of defaults and were, at least in part, responsible for creating the urgency of the situation.

The Court also dismissed Dairy Queen's application, finding that there was no evidence

beyond mere speculation that the plaintiffs would continue operating as a Dairy Queen restaurant in breach of the Release Agreement beyond June 30, 2018, and there was therefore no need for the relief sought.