CITATION: Presse Café Franchise Restaurants Inc. et al. v La Libelula et al., 2024 ONSC 6177
COURT FILE NOS.: CV-23-00693103-0000 and CV-23-00699347-0000
DATE: 20241112

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: PRESSE CAFÉ FRANCHISE RESTAURANTS INC, MARCEL HACHEM and EASTERN CANADIAN COFFEE COMPANY LTD, Plaintiff(s)/Applicant(s)

AND:

LA LIBELULA, FRANCISCO BAUTISTA and ALEJANDRA BAUTISTA PLANCARTE, Defendant(s)/ Respondent(s)

AND RE: LA LIBELULA, FRANCISCO BAUTISTA and ALEJANDRA BAUTISTA PLANCARTE, Plaintiff(s)/Applicant(s)

AND:

PRESSE CAFÉ FRANCHISE RESTAURANTS INC, MARCEL HACHEM, SAMI MOUNLA and EASTERN CANADIAN COFFEE COMPANY LTD, Defendant(s)/ Respondent(s)

BEFORE: Akazaki J.

COUNSEL: Subramanyam Narsimhan and Sowmya Roop Sanyal, for Presse Café Franchise Restaurants Inc., Marcel Hachem, Sami Mounla, and Eastern Canadian Coffee Company Ltd.

Daniel Hamson and Sara Ray Ramesh, for La Libelula, Francisco Bautista, and Alejandra Bautista Plancarte

HEARD: October 22, 2024

ENDORSEMENT

OVERVIEW

[1] These two competing applications arose from arbitral awards in a franchise law dispute under the *Arthur Wishart Act (Franchise Disclosure), 2000*, S.O. 2000, c. 3 and governed procedurally by the *Arbitration Act, 1991*, S.O. 1991, c. 17. The parties resolved the first phase of the arbitration by agreeing to a consent award holding the franchisor liable for material non-disclosure when the franchisee bought into the restaurant chain. For the reasons set out in my endorsement of October 22, 2024, I declined to adjourn the hearing

to permit the amendment of franchisor parties to amend the application to seek leave to appeal that consent arbitral award.

[2] The franchisors thus seek leave to appeal the second phase arbitral award under s. 45 of the *Arbitration Act*. In that award, the arbitrator found that Marcel Hachem and Eastern Canadian Coffee Company Ltd. were "franchisor's associates" under the *Arthur Wishart Act*. The consequence of that finding was that Mr. Hachem and ECCC were jointly and severally liable to pay the rescission costs owed by the franchisor pursuant to the consent award. The franchisors also seek leave to appeal the costs award. They argue that the arbitration agreement required the parties to bear their own costs of the arbitration. The franchisors also asked that the awards be set aside, once leave is granted.

[3] The franchisees seek court enforcement of the arbitral awards, pursuant to s. 50 of the *Arbitration Act*. There is no dispute that if the court denies leave to appeal, the court should issue judgments enforcing the awards.

[4] For the reasons that follow, the franchisors' application for leave to appeal is dismissed. The proposed appeal from the finding that Mr. Hachem and ECCC were "franchisor's associates" raises a question of fact dressed up as a question of law. Even if it were a question of mixed fact and law, there is no right of appeal, because the agreement provided no such right. The proposed appeal from the costs award is also dismissed, because the issue lacks sufficient importance to the parties to justify an appeal.

[5] Since I denied leave to appeal both issues, there is no need to decide the appeal. I will grant the franchisee's application to enforce the arbitral awards.

SECTION 45 OF THE *ARBITRATION ACT*

[6] The *Arbitration Act* contains the following provisions regarding appeals:

> **45** (1) If the arbitration agreement does not deal with appeals on questions of law, a party may appeal an award to the court on a question of law with leave, which the court shall grant only if it is satisfied that,
>
> (a) the importance to the parties of the matters at stake in the arbitration justifies an appeal; and
>
> (b) determination of the question of law at issue will significantly affect the rights of the parties. 1991, c. 17, s. 45 (1).
>
> **Idem**
>
> (2) If the arbitration agreement so provides, a party may appeal an award to the court on a question of law. 1991, c. 17, s. 45 (2).

> **Appeal on question of fact or mixed fact and law**
>
> (3) If the arbitration agreement so provides, a party may appeal an award to the court on a question of fact or on a question of mixed fact and law. 1991, c. 17, s. 45 (3).

[7] The franchisors conceded that the arbitration agreement was silent on the question of appeal rights. Subsections 45(2) and (3) therefore did not apply. Accordingly, they had no appeal right and had to bring their application under s. 45(1) for leave of the court to appeal on a question of law. They must also meet the criteria under clauses (a) and (b).

[8] The Supreme Court of Canada has directed courts hearing applications for leave to appeal arbitral awards to exercise caution in extracting questions of law from issue where fact and law are case specific and interdependent: *Sattva Capital Corp. v. Creston Moly Corp*., 2014 SCC 53, [2014] 2 SCR 633, at para 54.

APPEAL FROM FINDING OF "FRANCHISOR'S ASSOCIATE"

[9] The *Arthur Wishart Act*, s. 6, sets the conditions for a franchisee to rescind a franchise agreement based on lack of disclosure by the franchisor. Although technically regulating the affairs between businesses, the statute is generally considered akin to consumer-protection legislation. It compels franchisors to exacting standards of disclosure, given the power and knowledge imbalance between franchisors and parties applying for franchises. If a franchisee is found to have properly rescinded an agreement, it is entitled to compensation in the form of refunds and damages. In the first phase of the arbitration, the franchisor agreed the rescission had been justified.

[10] A "franchisor's associate" is a class of persons who face joint and several liability for a franchisor's defective disclosure. What qualifies a person as a franchisor's associate depends on his or her involvement in the representations and approval of a franchisee application. It is intended to lift the corporate veil to implicate people who could otherwise shield themselves behind a shell company. In some respects, the liability under s. 6 and the definition of "franchisor's associate" resembles statutes such as s. 13 of the *Construction Act*, R.S.O. 1990, c. C.30, in which classes of persons associated with a contractor can be held to have breached a construction funding trust and be held personally liable.

[11] Subsection 1(1) of the *Arthur Wishart Act* defines "franchisor's associate" as a person:

> (a) who, directly or indirectly,
>
> (i) controls or is controlled by the franchisor, or

(ii) is controlled by another person who also controls, directly or indirectly, the franchisor, and

(b) who,

(i) is directly involved in the grant of the franchise,

(A) by being involved in reviewing or approving the grant of the franchise, or

(B) by making representations to the prospective franchisee on behalf of the franchisor for the purpose of granting the franchise, marketing the franchise, or otherwise offering to grant the franchise, or

(ii) exercises significant operational control over the franchisee and to whom the franchisee has a continuing financial obligation in respect of the franchise; ("personne qui a un lien")

[12] The second phase arbitral award determined that Mr. Hachem and ECCC each qualified as a "franchisor's associate" because of their roles in reviewing and approving the franchise application. The franchisees submitted evidence to the arbitrator that the franchisors' agent sent the application to Mr. Hachem, the president of the company, for review. Mr. Hachem met with the franchise applicants, made representations about the franchisor's food and beverage offerings, and directly involved himself in the decision to assign the Bloor Street location to the franchise applicants. The arbitrator also found, based on Mr. Hachem being the sole director of ECCC, that it was controlled by the franchisor for the purposes of the definition of "franchisor's associate."

[13] The franchisors submitted no responding evidence at the arbitration. In their request for adjournment, the franchisors' newly appointed counsel submitted that their predecessors' failure to file responding evidence amounted to a new ground of appeal based on lawyer negligence. That issue was not before the court, and I declined to consider it. I appreciate that the lawyer from Borden Ladner who handled the case and, until recently, the leave to appeal application, would have been conflicted from advancing such a ground of appeal. The evidence on which the arbitrator found against Mr. Hachem and ECCC was not disputed. The franchisors' counsel, instead, sought to characterize the evidence as falling short of proving they were involved in the review or approval of the franchise application.

[14] In the circumstances, it was unfair to the franchisee to face an appeal based on lawyer incompetence at this late stage. For lawyer incompetence to justify an appeal, there must be a miscarriage of justice. *R. v. Hartling*, 2020 ONCA 243, at para 73. A decision not to call evidence is not intrinsically incompetent, or even negligent. Although not immune from suit, barristers have a wide degree of discretion in making tactical decisions on behalf of clients. See *Demarco v. Ungaro et al*., 1979 CanLII 1993 (ON SC), as discussed in *Amato v. Welsh*, 2013 ONCA 258, at paras. 40-57, and *Wong v. Thomson Rogers*, 1994 CanLII 841 (ON CA). In the circumstances of this case, such an appeal requires a trial of

the lawyers' negligence. The delay and cost of adding such a layer would be entirely out of proportion with the arbitral process to which the parties to the franchise agreed. If they are serious about this ground of appeal, they can pursue the lawyers in a separate action.

[15] My reason for revisiting the failed request to expand the grounds of appeal is to illustrate the tactical bind in which the franchisors found themselves going into the second phase of the arbitration. Since the first phase award determined the franchisor's liability to compensate the franchisee, the issue of Mr. Hachem and ECCC being the "franchisor's associates" turned on an assessment of the evidence of Mr. Hachem's role in the review and negotiation of the application to buy a franchise. Because of the franchisors' election not to adduce responding evidence, the arbitrator's sole task was to assess the reliability and credibility of the franchisees' evidence. This basic framing of the issue before the arbitrator makes the franchisors' task of extracting a legal issue on appeal rather difficult.

[16] The franchisors' submission that there was an extricable question of law arose from the arbitrator's language that the evidence raised a "reasonable inference" that Mr. Hachem was involved in the review and approval of the franchise application. They seized upon para. 46 of the arbitral decision, relying on an email from the agent that the application was forwarded "to our company President (Mr. Marcel Hachem) … You will meet Marcel during your trip to Montreal." The arbitrator stated that this evidence would give rise to the inference "by any reasonable person prospective franchisee such as Alejandra and members of the Bautista family, that Mr. Hachem would be directly involved…" The franchisors contended that the arbitrator thus incorporated a "reasonable person" standard to an otherwise pure fact-finding exercise.

[17] Paragraph 56 of the franchisors' factum stated: "The Arbitrator was required to make a factual finding of whether Mr. Hachem was involved in the grant of the franchise, not a normative finding of whether he would or ought to be involved in the grant of the franchise." Given the overall context of the arbitrator's reasons and factual conclusions, I did not glean an attempt to insert a "normative" standard of any kind to the fact-finding. Rather, on the specific emails from the agent and Mr. Hachem's admitted presence at the welcome meeting, the evidence before the arbitrator was that the franchise applicants would have drawn the inference that Mr. Hachem received the application and was at the meeting for a reason, i.e., that he was involved in assessing the candidates' qualifications, demeanor, and other factors in the approval process. If he received the application and met with the candidates, it was undisputed that Mr. Hachem was "involved" in the review *or* approval.

[18] Because the factual issue focused on Mr. Hachem's interaction with the franchise candidates, how a reasonable candidate would perceive his involvement would have been a measure of the franchisees' evidence. The use of the words "reasonable person," in describing how the arbitrator assessed the evidence, could be interpreted two ways.

[19] The first meaning is to take the deponent's words as being more than a subjective belief in Mr. Hachem's involvement. His use of the words, "reasonable person" was part of a typical credibility assessment of a party deponent's evidence of observations of another's conduct:

here, the conduct of Mr. Hachem and his franchise agent. In the context of the surrounding analysis, I saw nothing to indicate the arbitrator's intention to import a legal standard to the evidence he was required to review, beyond the ordinary burden of proof to prove facts on a balance of probabilities. The suggestion that he imported a "reasonable person" standard requires isolation of those words from the context and amounts to an attempt to manufacture a legal issue for appeal where there was none. Since the factual issue had to be determined on an objective standard and not on the subjective belief of the franchisees, the reasonableness of their evidence was no more than what the trier of fact was required to weigh.

[20] The second meaning could be that the word "person" was an inadvertent typographical insertion by a person with legal training and judicial experience. The phrase, "reasonable person prospective franchisee such as Alejandra" just seems less awkward and makes better sense if the word "person" is removed.

[21] Either meaning is far from the imposition of a legal standard for the application of the statutory meaning of "franchisor's associate." The remainder of the arbitrator's extensive analysis showed careful consideration of how the evidence established the specific "prongs" of the wording of clauses (a) and (b) in the statutory definition.

[22] There was no incorporation of an extraneous legal test in the arbitrator's distillation of the evidence. The arbitrator made his findings of fact based solely on an assessment of the evidence presented to him. Even if there were an issue regarding his application of the statutory wording to those facts, the questions of fact and law were so plainly connected that one could not extract an overriding issue of law. In any event, the so-called "reasonable person" standard could not have been one of them. There were no means of logically extracting a legal error, as in the case of the arbitrator's mistake regarding the rescission issue described below in the appeal from the costs order.

[23] There being no extricable question of law, I decline to grant leave to appeal the finding that Mr. Hachem and ECCC were "franchisor's associates." There is no need to consider the remaining points in s. 45(1), regarding the importance to the parties of the matters at stake and the rights of the parties.

APPEAL FROM THE COSTS ORDER

[24] The proposed appeal from the costs order is based on arbitral jurisdiction. The arbitrator ordered costs in the amount of $200,978.45. The sole ground of appeal is s. 18.6 of the franchise agreement, dealing with arbitration, stating that "The parties will each bear their own expenses, including their respective legal and accounting costs. The fees and expenses of the arbitrator will be apportioned between the parties in the discretion of the arbitrator."

[25] On its face, s. 18.6 did not remove the arbitrator's authority to award costs under s. 54 of the *Arbitration Act*. However, I agree with the franchisor's counsel that it certainly reads like a provision agreeing that the parties are expected not to claim costs.

[26] The arbitrator, at para. 124 of the award, decided that s. 18.6 ceased to apply once the consent award in phase 1 ratified the rescission of the franchise agreement. The franchisee's counsel conceded that s. 17(2) of the *Arbitration Act* ensured this clause survived the rescission of the agreement. Consequently, the principal argument in the arbitrator's interpretation of s. 18.6 appears clearly to be wrong. In the ensuing reasoning, especially at paras. 128-30, the arbitrator noted that s. 18.6 had been incorporated by reference into the arbitration agreement. The arbitration agreement stated:

> "Having regard to the stipulations of s. 18.6 of the Franchise Agreement, the Parties shall determine the powers and jurisdiction of the Arbitrator, including the Arbitrator's jurisdiction to award costs."

[27] However, he also held that the reference did not make the section "not extant in the sense of having contractual force." The September 5, 2018, submissions of counsel for the franchisors before the arbitrator asked for costs. The franchisee's counsel argued that this was evidence of an acknowledgment that the arbitration agreement amended s. 18.6. The consent award in the first phase also referred to an expected award of costs.

[28] Had the issue of the combined effect of s. 18.6 and the arbitration agreement been more limited, I would have concluded that the interplay between the two agreements raised a question of mixed fact and law, as the Supreme Court determined in *Sattva*, at para. 50. However, the incorrect conclusion that s. 18.6 was rescinded with the rest of the agreement seemed to lie at the root of the arbitrator's argument. The court must conclude that the entire reasoning was undermined by the error. While the correctness of the decision is part of the leave-granting analysis, the entry pass to s. 45(1) of the *Arbitration Act* is still the existence of a question of law. I therefore conclude that the costs issue raises a question of law. This does not mean the franchisors would succeed in the costs appeal. It only means the rescission point raised an extricable question of law that could result in the cost award being overturned on appeal.

[29] The existence of a question of law does not conclude the analysis. Clauses 45(1)(a) and (b) add further conjunctive hurdles for the would-be appellant.

[30] Clause (a) requires the court to consider whether the arbitrator's error in awarding costs is important to the parties and justifies and appeal. In the courts, costs awards have been considered inherently less important than the decisions in the actual dispute. This has been so, even though the monetary value of costs demands can sometimes be as much or greater than the main dispute. Ultimately, I accept the franchisees' argument regarding the franchisors' demand for costs in the application, not as evidence that the arbitrator possessed jurisdiction to award costs, but rather on the importance to the franchisors.

[31] The importance to the franchisors that s. 18.6 be enforced could not have been so significant as to prevent them from seeking costs in the arbitration when their counsel submitted: "The Respondents ask that this arbitration be dismissed, with costs." Had the jurisdictional point been important to the franchisors, they should have refrained from seeking costs at an earlier point in the arbitration when they were seeking dismissal of the

claim altogether. Importance to the parties for the purpose of clause (a) must be substantive and not dependent on the tactical direction or outcome of the proceeding.

[32] Clause (b) requires the court to consider whether the determination of the question of law will significantly affect the rights of the parties. The judicial consensus on this point appears to be that the question must result in overturning or setting aside the award: *Aronowicz v. Aronowicz*, 2007 CanLII 1885 (ON SC), at para. 30. All that is required is for the question to have a real impact on the award. I would not predetermine what an appeal of the question of the interaction of s. 18.6 and the subsequent agreement(s) could be. Counsel for the franchisees raised the possibility of novation through the arbitration agreement and through the consent award in the first phase. Quite clearly, the error in holding that the rescission of the franchise agreement set aside s. 18.6 could lead to an argument either way, regarding the arbitrator's jurisdiction. The proposed appeal therefore appears to satisfy the requirements of clause (b). However, since the requirements of both clauses (a) and (b) must be satisfied, the franchisors have still failed to satisfy the s. 45 test for leave to appeal.

[33] I therefore deny leave to appeal the costs award.

CONCLUSIONS

[34] The franchisors' application for leave to appeal the arbitral awards is hereby dismissed. The franchisees' application for enforcement is hereby granted, and judgment will issue accordingly.

[35] Unless there are grounds under rule 49 to hold otherwise, the franchisees are presumptively entitled to their costs of the proceeding. I will reserve my ruling on costs, including entitlement, scale, and amount, to allow the parties to attempt settlement of the costs. If parties are unable to resolve them, I will invite the franchisees to provide their submissions of no longer than three pages, as well as a bill of costs, within 20 days hereof. The franchisors will then have 20 days thereafter, to respond with their submissions of same length.

[36] If the franchisees require a formal order before the costs are settled or fixed, counsel may contact my judicial assistant to provide an approved draft or to settle the form and content.

Akazaki J.

Date: November 12, 2024