



The Enforcement of Releases in Light of the Tutor Time and Midas Cases

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Summary of Issues

- Any purported waiver or release by a franchisee of a right given under the Act or of an obligation or requirement of the franchisor or its associate under the Act is void.
- S.11 exemplifies presumption of inequality of bargaining power: any circumvention of Act's protections is void
- Parties cannot contract out of disclosure obligations, good faith duty, right to associate, rescission, right to statutory damages, etc.



1518628 Ontario Inc. v. Tutor Time

- 151 purchased shares of existing Burlington franchise
- Zor delivered UFOC in connection with the sale
- Zee faltered, blaming faulty disclosure (regulatory violations, arrears, accounting irregularities)
- 151 negotiated a settlement with the Zor, releasing Zor in exchange for forgiveness of arrears, a royalty credit and an advertising refund
- Zee failed, filed a notice of rescission and then sued for remedies under s.6(6)



Tutor Time

- Cumming J. found that the Settlement Agreement constituted a valid contract
- “S.11 does not apply to a release given (with the advice of counsel) by a franchisee in the settlement of a dispute for existing, known breaches of the Act by the franchisor in respect of its disclosure obligations, which would otherwise entitle the franchisee to a statutory rescission.”
- Settlement agreements for existing known breaches and negotiated with counsel are not prohibited by s.11



405341 Ontario Limited v. Midas

- P was member of a class seeking damages for alleged breach of good faith by Midas for outsourcing its product supply without decreasing royalty
- P sought a declaration that provisions in FA requiring a release as a condition to renewal or assignment were void as contrary to s.11
- Release would have disqualified plaintiff from the class proceeding and interfered with its right to associate pursuant to s.4(1) of the Act: ergo release provision was contrary to s.4(4)
- Release would have deprived plaintiff of right to statutory damages for breach of duty of fair dealing: ergo release provision was contrary to s.11



Midas

- Cullity J. distinguished Midas from Tutor Time
- Delivery of release would have deprived Zee of (i) participation in class proceeding and (ii) right to statutory damages
- Impugned provision did not actually interfere, but “purported” to interfere with the right to associate and was void under s.4(4)
- Provision requiring release did not actually release rights, but “purported” to waive rights to statutory damages and was void under s.11



Midas

- Provision in FA requiring release as a condition to renewal/assignment was tantamount to a release/waiver or interference prohibited by the Act
- A release given as a condition to renewal/assignment was not a “settlement” for an existing, known breach of the Act as in Tutor Time
- Parties were not engaged in settling claims; in fact plaintiff was attempting to continue to assert its claims



Discussion

Fairness and Consideration – Tutor Time

- S.11 seeks to right the imbalance of power between the Zee and Zor
- Tutor Time rights this imbalance:
 - Existing, known breaches of the Act (mature claims)
 - Zee has full knowledge of claims and consequences
 - Settlement is negotiated with counsel
 - Fair consideration (release for valuable economic concessions)



Discussion

Fairness and Consideration - Midas

- In Midas, presumption of unfairness is not rebutted
 - Zee had to agree to the release condition at the time of signing the franchise agreement
 - Zee asked to agree as a condition of renewal/assignment to release prospective claims which it could not have anticipated at outset of Zee/Zor relationship
 - Release given as a condition of renewal/assignment, in absence of additional consideration for matured claims, was not a “Tutor Time” Settlement
 - “Settlement” in Tutor Time is a binding contract for valuable consideration



Discussion

Scope of Release

- Tutor Time decision based on known breaches of disclosure obligations and release of remedies
- However, Tutor Time release was broad (past and future claims)
- Would Tutor Time permit a release of past and future claims (including disclosure violations) at or shortly after entering into the Franchise Agreement
- Note Cal. FIL: No modification to FA = general release under settlement until 12 mos. > FA signed



Discussion

US Examples

- Many US laws have “anti-waiver” language
- Several States expressly permit settlements of claims (IL, MI, WA, WI)
- Some statutes permit settlements AFTER entering into franchise agreement (MI, WA, CT, AR)
- Washington Code is very similar to ratio in Tutor Time



In Practice...

- In regulated provinces, do not make renewal and assignment conditional upon release
- In unregulated provinces, practice does not appear to be prohibited
- But, ensure governing law clause refers to unregulated province
- Amend existing agreements to preface requirement with “where permitted by law” in conjunction with “floating” governing law clause



In Practice...

- Upon renewal/assignment, releases can still be obtained by voluntary negotiation of the parties separately from and not as a condition to renewal or assignment
- Release of matured claims must be obtained by agreement, with the oversight of counsel, for adequate consideration and without coercion
- Where there exist no matured claims, parties and counsel could agree to a mutual release with representations from Zor that it is not aware of any known breaches and permitting Zee to sue for breach of representation



In Practice...

- “If the delivery of a release as a condition to assignment under Section x would be void under applicable law, then the parties shall negotiate in good faith, and with the oversight of their respective legal advisors, a mutual release for valuable consideration of claims existing up to the date of any assignment. The parties shall not be bound to negotiate such a release and consent to any transfer or assignment hereunder shall not be conditional upon the execution of a release under this subsection or the efforts of the parties to negotiate such a release.”
- Zees with arrears/violations may desire release



Conclusion

- Midas and Tutor time clarify scope of s.11 and provide important guidance on the effect of releases
- Franchisors and their counsel should appreciate the implications of these decisions and the impacts on their practices
- Questions



Part II: Disclosure Issues on Renewal



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Disclosure upon Renewal

- S.5(7)(f) of Act exempts Zor from disclosure upon the renewal or extension of a franchise agreement where there has been
 - no interruption in the operation of the franchised business
 - no material change since the FA or latest renewal/extension entered into
- S.5(1)(d) of Alberta Franchises Act exempts Zor from disclosure upon a renewal or extension of an existing franchise agreement



Disclosure upon Renewal

- “material change”: change in the business, operations, capital or control of the franchise
- change in the system, prescribed change or decision to implement such a change
- would reasonably be expected to have a significant adverse effect on value or price of franchise or decision to acquire franchise



Disclosure upon Renewal

- “material change” considered in MDG Kingston Inc. v. MDG Computers Canada Inc. (2007, S.C.J., 2008 OCA)
- No disclosure given upon renewal
- Exemption did not apply: Court found “changes in the second renewal affecting costs of services, allocation of expenses..., punitive penalty provisions, purchase price of goods, and warranty...provisions, that are fundamental”
- Changes would have reasonably had an effect on decision to acquire or continue operations



Disclosure upon Renewal

- New agreement to replace an old agreement or new agreement to extend an old agreement may be a “renewal or extension” in the sense of 5(7)(f) of Act:
 - TA&K Enterprises Inc. v. Suncor Energy Products Inc.
- If replacement agreement is a renewal or extension, then next question is whether there occurred any material [adverse] change
- If not then exemption is available



Disclosure upon Renewal

- What is the scope of “significant adverse effect”?
- Threshold question might be: If you are worried about the impact of the disclosure, then you should disclose
- Counsel of Perfection: Fresh disclosure upon renewal/extension in ordinary course
- However, successful Zee motivated to extend may be less sensitive than Zee prospect, ie. It would take a lot to deter them; also, s.7(4)
- May be more latitude to use exemption



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