Court of Queen's Bench of Alberta

Citation: Bad Ass Coffee Company of Hawaii Inc. v. Bad Ass Enterprises Inc., 2008 ABQB 404

Date: 20080702
Docket: 0501 12165
Registry: Calgary

Between:

Bad Ass Coffee Company of Hawaii Inc.

Plaintiff

- and -

Bad Ass Enterprises Inc., Attitude Coffee Corporation and Ron Plucer also known as Ronald Plucer

Defendants

Reasons for Judgment
of the
Honourable Madam Justice C.A. Kent

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[1] Bad Ass Hawaii (Hawaii) operates a franchise operation for the distribution and sale to retail stores of Bad Ass coffee products. Bad Ass Enterprises Inc. ("Enterprises") and Attitude Coffee Corporation ("Attitude") are companies incorporated under the Canadian Business Corporations Act. Ron Plucer is a resident of Alberta and is a director of Attitude and Enterprises. The parties entered into various agreements in 1999 and 2000 which form the subject matter of the dispute between them. The first was a franchise agreement dated February 16, 2000 which had a guarantee of Ron Plucer attached. The second was a franchise agreement dated December 29, 2000 which also attached a guarantee of Ron Plucer. Finally, there was a multi-unit development agreement (MUDA) dated December 16, 2002 again attaching a guarantee of Ron Plucer. Disputes arose between the parties. Hawaii made a demand for arbitration in Utah and then filed a petition to compel arbitration in Utah on August 11, 2004. On

August 31, 2004, Attitude and Enterprises filed a claim in the Court of Queen's Bench of Alberta in Calgary against Hawaii. That claim also dealt with disputes which had arisen between the parties. The arbitration proceeded in Utah. The arbitrator awarded damages to Hawaii. Hawaii registered that award in the Utah district court subsequent to which Hawaii filed a Statement of Claim in this action seeking to enforce the award. An application was made before the Master for summary judgment by Hawaii against all three defendants. The application for summary judgment was granted. This is an appeal from that decision.

The Arbitration Process

[2] As indicated above, Hawaii first demanded arbitration of the disputes between the parties and subsequently filed a petition to compel arbitration. The Defendants filed a response to the petition to compel arbitration in Utah. Judge Jenkins of the U.S. District Court granted an Order to submit the disputes to arbitration. A pre-hearing conference was held with the arbitrator on November 22, 2004. Both Hawaii and the Defendants were represented at that teleconference. A schedule was established, a hearing date set and the parties agreed that attorney fees may be awarded by the arbitrator depending on the outcome of the arbitration.

[3] The Defendants participated in pre-hearing proceedings and submitted a list of witnesses and copies of hearing exhibits. In a letter dated January 19, 2005, the Defendants advised the arbitrator that they did not intend to participate in the arbitration hearing because they disputed the jurisdiction of the arbitration. The arbitration proceeded as scheduled on January 25, 2005. The Defendants were not in attendance.

[4] In his decision dated February 28, 2005, the arbitrator made certain findings of fact which resulted in the award which is the subject of this appeal. He found that in February 2000, the parties entered into the first franchise agreement with respect to an establishment on 17th Avenue S.W. in Calgary. In December, 2000, the parties entered into a second franchise agreement for another establishment also located on 17th Avenue S.W. in Calgary. The second store did not open on 17th Avenue S.W., but rather opened on 19th Street N.E. Until April 2004, Attitude paid royalties and advertising fees for the store on 19th Street N.E. The arbitrator found that the operation of that store was pursuant to the second franchise agreement. In December 2002, the parties entered into the MUDA which required Enterprise to open seven stores by 2004. That agreement also required that for each store opened, Enterprise would be required to enter into a standard franchise agreement and pay a $10,000.00 franchise fee. In August 2004, the Defendants opened a third establishment on 17th Avenue S.E. No franchise agreement was executed nor was any money paid.

[5] Beginning in April 2004, Enterprise and Attitude stopped paying royalties, advertising fees and providing weekly gross sales reports for the two stores which it had opened pursuant to the first and second franchise agreements. There were never any royalties, advertising fees or weekly gross sales reports provided for the third store. On May 7, 2004, the Defendants sent a letter to Hawaii declaring that the contractual arrangements were cancelled and terminated. In response, Hawaii sent the Defendants written notice of their default under the agreements and demanding that those defaults be cured within 15 days. On August 12, 2004, Hawaii sent the

Defendants a Notice of Termination of the franchise agreements and the MUDA. After the termination of the agreements, the Defendants continued to operate the establishments using Hawaii's logo and trade name. That operation continued up to the time of the arbitration. The Defendants also had a website which used Hawaii's trademark logo and offered franchises for sale.

[6] The arbitrator found that the Defendants were liable for each week that no royalty fee or advertising fee was paid prior to the termination of the second franchise agreement. He found that to be a reasonable estimate of the damages related to Attitude's continued operation of its store using Hawaii's trademarks. Because of the Plucer guarantee of the second franchise agreement, he found Plucer jointly and severally liable for those damages. The arbitrator found that Enterprises was liable under the MUDA for the $10,000.00 franchise fee for the third store and for the royalty and advertising fee for each week that the third store was open. Again, he found Plucer jointly and severally liable under the guarantee attached to that agreement. With respect to the first franchise agreement, the arbitrator found Enterprises liable for the royalty and advertising fees through to January 30, 2005 again with Mr. Plucer being jointly and severally liable. In addition to the amounts under the agreements, the arbitrator awarded Hawaii slightly over $85,000.00 in attorney fees. That award was confirmed as a judgment of the Utah District Court.

The Agreements

[7] Each of the franchise agreements deals with the proper law of the contract, the issue of arbitration, and with each there is a guarantee signed by Mr. Plucer. The first arbitration agreement requires that any dispute shall on the request of either party be submitted to arbitration at Salt Lake City, Utah although the hearing could be in either Salt Lake City or Alberta. The laws of the State of Utah would govern substantively. The guarantee is signed by Mr. Plucer and the guarantee is notarized. The arbitration provision is incorporated by reference. There is no certificate as is required under *The Guarantees Acknowledgement Act* (G.A.A.) of Alberta. The agreement provides that disputes concerning franchise fees, product purchase lists, advertising fees and all other fees charged by the Franchisor are specifically exempted from the arbitration provisions.

[8] The second franchise agreement has the same clause, requiring disputes to be submitted to arbitration and provides that the laws of Utah govern. There is the identical guarantee signed by Mr. Plucer with no G.A.A. certificate.

[9] The MUDA provides that if a dispute is not resolved within 60 days of a request to resolve the dispute, either party may demand arbitration pursuant to the commercial arbitration rules of the American Arbitration Association. It provides that the arbitrator will deal with pre-arbitration scheduling, that the arbitration shall be held in Salt Lake City and that the rights of the parties and provisions of the agreement shall be interpreted in accordance with the laws of the State of Utah. Again, there is a guarantee signed by Mr. Plucer but with no G.A.A. certificate. The arbitration clause is not incorporated by reference, likely as a result of a typographical error.

[10] Both the first and second franchise agreements have a construction and jurisdiction clause which differs from the third agreement. The clause in the first and second agreement (Clause 19.01) states:

> This agreement shall be governed construed and interpreted in accordance with the laws of the State of Utah. However, if a Court of competent jurisdiction determines that this agreement must be governed by the laws of another state or province, then the laws of that state will govern this agreement. If the laws of the state whose laws govern this agreement, including Utah, require terms other than or in addition to those in disagreement, then such terms shall be deemed incorporated herein, but only to the extent necessary to prevent the invalidity of this agreement or any of the provisions hereof or the imposition of civil or criminal penalties or liability. To the extent permitted by the laws to the state whose laws govern this agreement, franchisee hereby waives any provisions of law regulations which render any portion of this agreement altered invalid or unenforceable in any respect. If any provisions of this agreement are, or shall come in conflict with any applicable laws, then the applicable law shall govern and such provisions shall be automatically deleted and shall not be effective to the extent they are not in accordance with applicable law and the remaining terms and conditions of this agreement shall remain in full force and effect. All words in this agreement shall be deemed to include any number and gender as the context and sense of this agreement requires.

The construction and jurisdiction clause (Clause 15.03) in the MUDA says:

> The rights of the parties and provisions of this Agreement shall be interpreted and governed in accordance with the laws of the State of Utah, U.S.A. and You consent to the exercise over the Your general personal jurisdiction and venue of the courts of record of the State of Utah, U.S.A. We and You agree that all clauses of action and claims arising out of this Agreement that are not arbitrated shall be litigated in the courts of record in the State of Utah, even though it may otherwise be possible to obtain jurisdiction over Us elsewhere. Nothing herein shall prevent the Company from obtaining injunctive relief and enforcement of judgments and arbitration rulings in the courts of other jurisdictions. All words in this Agreement shall be deemed to include any number or gender as the context or sense of this Agreement requires.

Position of the Parties

[11] The Defendants raise several arguments why the arbitration judgment ought not to be enforced. These were all dealt with in some detail by the Master. Specifically, I am in agreement with her findings that the Defendants attorned to the jurisdiction of the Utah Court and the Utah arbitrator for the reasons set out in her decision. I will say no more. I also agree with her reasoning with respect to the question of a real and substantial connection between Utah and the matters in issue. There is a real and substantial connection between Utah and the matters in issue.

In my view, two matters which merit some analysis here are whether or not the defence of public policy should be applied and the correct interpretation of certain sections of *The Franchises Act*, R.S.A. F-23. Furthermore, the Appellants made an argument with respect to the exemption in the arbitration clause. Finally, the Defendants have refined their argument with respect to *The International Commercial Arbitration Act*, R.S.A. I-5. That also requires consideration.

[12] Dealing first with the issue of public policy, there are two pieces of Alberta legislation that are relevant. The first is *The Franchises Act*. It provides:

> 15. The rights of action conferred by this *Act* are in addition to and do not derogate from any other right the franchisee or the franchisor may have at law.
>
> 16. The law of Alberta applies to franchise agreements.
>
> 17. Any provision in a franchise agreement restricting the application of the law of Alberta or restricting jurisdiction or venue to any forum outside Alberta is void with respect to a claim otherwise enforceable under this *Act* in Alberta.
>
> 18. Any waiver or release by a franchisee of a right given by this *Act* or the Regulations or of a Requirement of this *Act* or the Regulations is void.

[13] The second piece of legislation which is relevant is *The Guarantees Acknowledgment Act*, R.S.A. G-11. Section 3 requires that no guarantee has any effect unless the person who signs the guarantee appears before notary public, acknowledges that he or she has executed the guarantee and signs a statement at the foot of the Notary Public's Certificate. The certificate of the notary public must state that the notary is satisfied that the person entering into the guarantee is aware of the contents of the guarantee and understands it.

[14] The Defendants approach the public policy argument in several ways. The Defendants argue that neither of the guarantees to the first and second franchise agreement contain a choice of laws clause. They both incorporate the arbitration clause but not clause 19. Thus, since the guarantees were executed in Alberta, the obligations guaranteed arose in Alberta and the primary debtors are Alberta corporations, the laws of Alberta apply. Since there is no certificate as required by s.3 of the G.A.A., the guarantees are unenforceable.

[15] With respect to the MUDA, the Defendants acknowledge that the guarantee does state that it is governed by the laws of Utah. However, they rely on *Cardel Leasing Ltd. v. Maxmenko* 1991 CarswellOnt 633 (Ont. C.J. Gen. Div.) for the proposition that such a clause will not be enforced where it is contrary to public policy or is illegal in the jurisdiction where the contract is to be performed.

[16] In *Cardel*, Cardel leased a vehicle to Maxmenko. The lease agreement provided that the agreement would be governed by the laws of Ontario. There was a proviso that any provision which contravened the laws of the jurisdiction where the contract was to be performed would be

deemed not to be part of the agreement. In B.C., where Mr. Maxmenko resided, there was a seize or sue provision. Mr. Maxmenko argued that because Cardel had repossessed the car, it could not sue.

[17] Adams, J. held that because the contract was performed in B.C., the proviso in the agreement made the 'sue' provisions of the agreement unenforceable. He said the following at para 7:

> Where the parties to a contract expressly stipulate that an agreement shall be governed by a particular law, that law will generally be the proper law of the contract. See *Vita Food Products Inc. v. Unus Shipping Co., supra*, at p. 290. This freedom of choice, however, is subject to certain limitations. As Lord Wright in the *Vita Food Products* case observed, the selection must be *bona fide* and legal and there must be no reason for avoiding the choice on the ground of public policy. As an example, Professor Castel points out in his treatise that where a law is expressly chosen to evade the provisions of the system of law with which the transaction, objectively, is most closely connected, that choice will be disregarded. See J.G. Castel, *Canadian Conflict of Laws* (2nd ed., 1986), at p. 531. The learned author also notes at page 554 that there is substantial weight of authority in support of the proposition that a contract illegal by the law of the country where it is to be performed will not be enforced notwithstanding the explicit choice of law of the contracting parties. Examples of this exception are: *Ralli Bros. V. Compania Vaviera Sota y Aznar*, [1920] 2 K.B. 287, [1920] All E.R. Rep. 427 (C.A.); *Kleinwort Sons & Co. v. Ungarische Baumwolle Industries A.G.*, [1939] 2 K.B. 678 at 697; *Regazzoni v. K.C. Sethia (1944) Ltd.*, [1958] A.C. 301 at 319, [1957] 3 All E.R. 286 (H.L.).

[18] The Defendants say that here the principal debtors carry on business in Alberta, the franchises were to be operated in Alberta, the agreements were executed in Alberta and the obligations were to be incurred in Alberta. Thus, the choice of Utah laws was not *bona fide*. The guarantee was most closely connected to Alberta. Under Alberta law, the guarantee is void.

[19] Alternatively, the Defendants argue that all three agreements are subject to Alberta law because of *The Franchises Act*. Sections 16, 17 and 18 all mean that any provisions purporting to apply the laws of Utah are void. It follows, they argue, that since *The Franchises Act* says the laws of Alberta apply, the requirements of the G.A.A. mean that the guarantees are void. The Defendants say that it would offend notions of justice and morality if this court enforced a judgment when under Alberta law the guarantees are void.

[20] The Defendants then argue that since by Alberta law, the guarantees are void, a court in Alberta should not enforce the Utah judgment. The Defendants say that if public policy does not demand that this judgment not be enforced, then a new defence should be recognized. In *Beals v. Saldanha*, 2003 S.C.C. 72, some of the judges noted that what may be a defence to enforcement of a judgment should be flexible. For the majority, Major, J. said at para 42 that "[u]nusual

situations may arise that might require the creation of a new defence to the enforcement of a foreign judgment." The new defence which the Defendants propose centres around the principle that residents of Alberta should be protected. It appears to be based in an assumption that Hawaii had intentionally chosen a forum that would circumvent Alberta law which protects guarantors.

[21] Hawaii argues that the refusal to enforce a foreign judgment on the basis that the judgment was founded on law that offends the fundamental morality of the Canadian concepts of justice should be used sparingly. The provisions of the G.A.A. do not meet the requisite threshold. This is particularly so since Mr. Plucer admitted that he understood the significance of the guarantees. Likewise the provisions of *The Franchises Act* cannot be said to reflect principles of fundamental morality which need to be enforced.

Analysis

[22] Dealing with the guarantees in the first and second agreements, the defendants are correct that clause 19 is not incorporated. The arbitration clause is incorporated. It provides that the law of Utah applies substantively. Because of that reference, the guarantees are not void, unless the defence of public policy applies.

[23] The Defendants say that s. 16 of *The Franchises Act* says that the law of Alberta governs which means the G.A.A. governs. The Master nicely summarized the state of the law, citing the Ontario Court of Appeal decision in *Society of Lloyd's v. Saunders* [2001] O.J. No. 3403. The issue in *Saunders* was whether the Ontario courts should enforce English judgments against Lloyd "names" even though the applicant for judgment had breached the prospectus requirements of *The Ontario Securities Act*. Although the court found that the disclosure obligation was aimed at protecting the integrity of the capital markets which in turn was a fundamental value, the court permitted enforcement of the judgment for two reasons. First, the English courts knew of the breach but permitted the actions to be heard and secondly because international unity required enforcement.

[24] Here, there has been no breach of *The Franchises Act*. There has been a breach of the G.A.A. The purpose of the G.A.A. is to ensure that guarantors understand the personal liability that they are undertaking. Unsophisticated borrowers may not understand that they are taking on a potential financial burden. The G.A.A. insures that they do understand. Given the Act's intention to protect unsophisticated borrowers from unexpected debt, it is a fundamental value of this province. However, as in *Saunders*, whether that affords a defence to enforcement of a foreign judgment depends on the facts. Here, the borrower was a businessman who knew what obligation he was undertaking. The defence of public policy does not apply.

[25] The Defendants say that I can and should create a new defence. I do not know what that would be. The way the Defendants frame it - residents of Alberta should be protected - is simply restating the public policy defence. I decline to create any new defence.

[26] The next issue in the interpretation of s. 17 of *The Franchises Act. The Franchises Act* contains provisions all of which are intended for the protection of the parties, but particularly the franchisees. Indeed, s. 2 provides that the purpose of the Act is to assist prospective franchisees in making decisions and to ensure fair dealing between franchisees and franchisors. The Act then deals with obligations of disclosure, franchisees' right to associate and misrepresentation. Then it provides remedies with respect to breaches of the provisions regarding the issues listed above. S. 17, which limits jurisdictional choice, contains the words "with respect to a claim otherwise enforceable under the Act." Hawaii's claims are not claims under *The Franchises Act*. Accordingly, the Master's conclusion that s. 17 is irrelevant to this claim is correct.

[27] The second issue is one that was not expressly before the Master. Clause 14 specifically exempts disputes regarding franchise fees, product purchase costs, advertising fees and all other fees charged by the franchisor. The Defendants say that other fees includes royalties. The Defendants argue that the dispute between the parties is exactly what is exempted. Accordingly the Arbitrator did not have jurisdiction.

[28] I do not accept the argument that the dispute is exempt. The dispute was not simply over royalties and fees. It dealt with a complete breakdown of the business relationship between the parties. It included the improper use of Hawaii's name and trademark. I reject that argument.

[29] The final issue deals with *The International Commercial Arbitration Act*. The Defendants make three arguments. First they say that s. 3 requires an application to this Court to enforce an arbitral award. Hawaii did not do that but rather proceeded by way of claim to enforce its judgment. The process followed by Hawaii was the correct process. The arbitral award became a judgment in Utah. Once that happened, the correct method of enforcement was by Statement of Claim.

[30] The second argument is that Article V of The Convention of the Recognition and Enforcement of Foreign Arbitral Awards provides that enforcement may be refused if the award deals with something beyond what was submitted to arbitration. The Defendants say that this dispute involved issues that were exempt under the arbitration clause. I have held above that the dispute did not deal with exempt issues.

[31] Finally, Article V says that enforcement may be refused if the award is contrary to public policy of the jurisdiction concerned. Again, that argument has been dealt with above.

[32] In the result, the appeal of the Master's decision is dismissed.

Heard on the 27th day of March, 2008.
Dated at the City of Calgary, Alberta this 2nd day of July, 2008.

C.A. Kent
J.C.Q.B.A.

Appearances:

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