Citation: Grow Biz v. D.L.T. Holdings Inc.
2001 PESCTD 27

Date: 20010323
Docket: GSC-17431
Registry: Charlottetown

PROVINCE OF PRINCE EDWARD ISLAND
IN THE SUPREME COURT - TRIAL DIVISION

BETWEEN:

GROW BIZ INTERNATIONAL INC.

APPLICANT

AND:

D.L.T. HOLDINGS INC., and DEBBIE TANTON

RESPONDENTS

BEFORE: The Honourable Chief Justice K. R. MacDonald

Gary S. Scales	-	Solicitor for the applicant
E. W. Scott Dickieson	-	Solicitor for the respondents

Place and date of hearing	-	Charlottetown, Prince Edward Island November 27, 2000
Place and date of judgment		Charlottetown, Prince Edward Island

March 23, 2001

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Prince Edward Island Supreme Court - Trial Division
Contested Chambers
Before: MacDonald C.J.
Heard: November 27, 2000
Judgment: March 23, 2001
[21 pages]

Arbitration - Uncitral Model Law on international arbitration- application for recognition of arbitration award.

STATUTE CONSIDERED: ***International Commercial Arbitration Act***, R.S.P.E.I. 1988, Cap. I-5;

CASES CONSIDERED: ***Re Corporacion Transnacional de Inversiones, S.A. de C.V. et al. and STET International, S.p.A. et al.*** (1999), 45 O.R. (3d) 183; (2000), 49 O.R. (3d) 414; ***Ronald Elwyn Lister Ltd. v. Dunlop Canada Ltd.*** , [1982] 1 S.C.R. 726; ***Aamco Transmissions Inc. v. Kunz*** (1991), 97 Sask. R. 5; ***Heinhuis v. Blacksheep Charters Ltd. et al.*** (1987), 46 D.L.R. (4d) 67 (B.C.C.A.); ***Ellis v. Subway Franchise Systems of Canada Ltd.,*** et ors, unreported (Ont. Ct. of Justice), (May 15, 2000, Court file #99-CL-3532); ***Mundinger v. Mundinger*** (1968), 3 D.L.R. (3d) 338 at pp. 341-2 (Ont. C.A.), aff'd (1970), 14 D.L.R. (3d) 256*n* (S.C.C.).

Gary S. Scales	-	Solicitor for the applicant
E. W. Scott Dickieson	-	Solicitor for the respondents

MacDonald C.J.:

[1] This is an application for an order for the recognition and enforcement of an arbitral award dated September 3, 1998, which award was confirmed by order of the Hennepin County District Court in Minnesota, U.S.A.

[2] The relief granted by the arbitrator was:

> (a) the sum of $55,006.80 (Canadian) for unpaid royalties, interest on royalties, advertising fees and buying group fees;
>
> (b) the sum of $3,601.69 (U.S.) for the Applicant's costs;
>
> (c) The sum of $4,630.00 (U.S.) for attorney's fees;
>
> (d) the sum of $1,000.00 (U.S.) for the arbitrator's fees;
>
> (e) interest on all unpaid sums at the rate of 1.5% per month;
>
> (f) to cease all competition with Once Upon A Child within a 6 mile radius of the franchised store location for a period of one year;
>
> (g) to return to the Applicant the Respondent's Operations Manual and all other manuals, advertising materials and all other printed materials pertaining to the Business;
>
> (h) to assign to the Applicant the Respondent's telephone number for the store;
>
> (i) to repaint the store with totally different colors;
>
> (j) to remove all Once Upon A Child signs, names, marks and fixtures; and...

[3] The award is sought to be enforced under the Prince Edward Island International Commercial Arbitration Act, R.S.P.E.I., 1988, Cap. 1-5.

[4] Enforcement of the award by the respondents is opposed for the following reasons:

(1) The respondent ("Tanton") did not have independent legal advice when she signed a franchise agreement and personal guarantee.
(2) The respondents were misrepresented by the applicant.
(3) The respondents could not afford to attend the arbitration hearing in Minnesota.
(4) The award extends beyond the scope of arbitration.
(5) The arbitration award does not indicate the arbitration procedure was in accordance with the laws of Prince Edward Island.
(6) Recognition of the award would be contrary to public policy.

FACTS

[5] The applicant Grow Biz is an incorporation organized under the laws of Minnesota. The respondent, D.L.T. Holdings, Inc. ("D.L.T.") is incorporated under the laws of Prince Edward Island. The respondent Debbie Tanton ("Tanton") is an officer and shareholder of the respondent D.L.T. In early 1994 Tanton became aware of a clothing franchise being offered by the applicant known as "Once Upon A Child" and in March 1994 she and her husband went to Minneapolis, Minnesota to attend a promotional session given by the applicant.

[6] Subsequently, Tanton decided she would purchase a franchise from the applicant, the fee being $28,300 in Canadian funds.

[7] In her affidavit, Tanton stated that between July 17 and July 27, 1994 she attended a training session in Minneapolis, Minnesota during which time she executed the franchise agreement, a personal guarantee and an assignment and assumption of the franchise agreement to D.L.T. She further states she asked if she could take the franchise agreement back to Prince Edward Island to have it reviewed by a lawyer and was told by the applicant it was not necessary. She states that she signed the documents in July, while in Minneapolis, without benefit of legal counsel, and did not know what she was signing. She further states that she was actively discouraged from obtaining legal advice.

[8] She also states that at this time she told the applicant she intended to incorporate a company on Prince Edward Island so that she would not be liable for future losses. Tanton states in her affidavit that the applicant told her she could assign the franchise agreement to her company and she would not be

personally liable.

[9] Further in her affidavit Tanton states the terms of the franchise agreement were never explained to her and she was not aware of the provision that disputes would be dealt with by way of arbitration in Minneapolis. Consequently, whether or not Tanton had independent legal advice must first be determined.

[10] The affidavit of Rebecca J. Geyer, dated September 2, 1999, solicitor for the applicant, casts a somewhat different light on some of the facts surrounding the signing of the franchise agreement. Ms. Geyer states the franchise agreement was signed June 20, 1994. She agrees that Tanton assigned her rights under the franchise agreement to D.L.T. in July, 1994 and signed the personal guarantee at the same time.

[11] The dates set forth by Ms. Geyer are supported by the documentation that has been filed. The franchise agreement is dated the 20th day of June, 1994. There is also a letter from John Fortier, attorney for Tanton, dated June 20, 1994 to the applicant stating that he is enclosing the franchise agreement, in triplicate, duly executed by Debbie Tanton. Attached to the franchise agreement is an addendum to the franchise agreement, also dated June 20, 1994.

[12] Further, in a letter from Steven A. Gemlo, Vice-President of Grow Biz to Tanton on April 18, 1994, a uniform franchise offering circular and three copies of the franchise agreement were enclosed. In the letter, it is stated that Tanton should hold the "franchise agreement and owner's guaranty for ten days before you sign them and return to me". This would indicate that Tanton had the franchise agreement and personal guarantee in April, 1994.

[13] On the front page of the uniform franchise offering circular is the following:

> INFORMATION FOR PROSPECTIVE FRANCHISEES REQUIRED BY FEDERAL TRADE COMMISSION
>
> To protect you, we've required your franchisor to give you this information. We haven't checked it, and don't know if it's correct. It should help you make up your mind. Study it carefully. While it includes some information about your contract, don't rely on it alone to understand your contract. Read all of your contract carefully. Buying a franchise is a complicated investment. Take your time to decide. If possible, show your

> contract and this information to an advisor, like a lawyer or an accountant. If you find anything you think may be wrong or anything important that's been left out, you should let us know about it. It may be against the law.
>
> There may also be laws on franchising in your state. Ask your state agencies about them.
>
> FEDERAL TRADE COMMISSION,
>
> Washington, D.C.

[14] The following may also be found in the franchise agreement:

> B. Franchise Agreement. Franchisee acknowledges that it has received, read, and understood this Agreement and that Franchisor has fully and adequately explained the provisions of it to Franchisee's satisfaction and that Franchisor has accorded Franchisee time and opportunity to consult with advisors of its own choosing about the potential benefits and risks of entering into this Agreement.
>
> . . .
>
> This is a legal document which grants specific rights to and imposes certain obligations upon Franchisor and Franchisee. Consult legal counsel to be sure that you understand your rights and duties. Please insert the name and address of your attorney:
> _____

[15] These latter two quotes are relevant as they are a warning to anyone who does not understand the content of the documents to consult an advisor. The letter that Tanton received from Steven A. Gemlo stating she should hold the documents for ten days before signing them is obviously to give the prospective franchisee time to think about what she is getting into before signing. It also allows her ten days to obtain legal advice.

[16] While Ms. Tanton when being discovered was quite adamant that the franchise agreement was signed in July, not June, she eventually appeared to lose some of her confidence when she stated:

> I am almost positive I think I signed it that franchise agreement in Minneapolis, or I signed it when I came back with Fortier but I think that was the incorporation stuff I was signing in September and October.

[17] The fact that Tanton took the position she signed the documents in

Minneapolis, and she was not allowed to bring them back to Prince Edward Island to have them reviewed by her lawyer, does not enhance her credibility in view of the correspondence from her lawyer, John Fortier, and the letter from Steven A. Gemlo on April 18, 1994 enclosing the franchise agreement. Tanton pointed out that there was space in the franchise agreement where she was to insert the name of her attorney, and this had not been done. I place no significance to this omission.

[18] The assertion by Tanton that she did not have independent legal advice is also greatly damaged due to the fact that she did not have Mr. Fortier testify, or give affidavit evidence, as to his role with the documents and his legal representation of her.

[19] Remembering the sequence of facts and times that happened some five years previous is not an exacting process. The simple question is how could the franchise agreement have been signed in July in face of the letter from Fortier on June 20 stating he was forwarding the duly executed franchise agreement to the Applicant. I have no doubt that the franchise agreement was signed on June 20, 1994.

[20] The importance of finding the franchise agreement was signed in Prince Edward Island is that it refutes Tanton's affidavit that she was not allowed to have independent legal advice when she allegedly signed in Minneapolis. In fact, her lawyer was aware of the franchise agreement and whether or not she discussed it with him is her responsibility. Consequently, her submissions that she did not know what she was signing when she executed the franchise agreement is futile.

[21] On October 4, 1994, letters patent were issued to D.L.T. Holdings Inc. This was one month **after** D.L.T. entered into a lease of the premises where the franchise operation was carried out. The October 4th date is also after the July date when Tanton assigned to D.L.T. all her interest in the franchise agreement, which assignment was consented to by the applicant.

[22] In 1997, D.L.T. fell into default under the provisions of the franchise agreement. Subsequently, Grow Biz commenced arbitration proceedings against D.L.T. Paragraph 19(a) of the franchise agreement states:

> 19. ARBITRATION: ENFORCEMENT

> A. Arbitration Process: Except to the extent Franchisor elects to enforce the provisions of this Agreement by judicial process and injunction as provided herein, all disputes, claims and controversies between the parties arising under or in connection with this Agreement or the making, performance or interpretation thereof (including claims of fraud in the inducement and other claims of fraud and the arbitrability of any matter) will be settled by arbitration under the authority of the Federal Arbitration Act in Minneapolis, Minnesota. The arbitrator will have the right to award specific performance of this Agreement. The proceedings will be conducted in accordance with the commercial arbitration rules of the American Arbitration Association, to the extent such Rules are not inconsistent with the provisions of this arbitration provision. The decision of the arbitrator will be final and binding on all parties. This Section will survive termination or non-renewal of this Agreement under any circumstances. Judgment upon the ward of the arbitrator may be entered in any court having jurisdiction thereof. During the pendency of any arbitration proceeding, Franchisee and Franchisor will fully perform their respective obligations under this Agreement.

[23] D.L.T. did not send a representative to the arbitration proceeding, Tanton stating that she could not afford to attend the arbitration proceedings. She further states that she was never informed of the provision in the franchise agreement providing for arbitration proceedings to take place in Minnesota.

[24] On September 3, 1998, an arbitration award was made in favour of Grow Biz. On February 16, 1999, Grow Biz made an application in Minnesota to confirm the arbitration award. The respondents were served notice of the application, but again did not attend. The Hennepin County District Court confirmed the arbitration award on May 18, 1999. On July 19, 1999 Grow Biz made application to this Court to enforce the arbitration award.

LAW

[25] The respondents admit that article 36(1)(a) places the burden on them to show that recognition of an arbitral award should be refused. The application relies on the ***International Commercial Arbitration Act***, R.S.P.E.I. 1988, Cap. I-5 (the "***Act***"). This ***Act*** incorporates in Schedule A the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, and in Schedule B the Uncitral Model Law on International Commercial Arbitration.

[26] Section 2 of the ***Act*** states the Convention applies to arbitral awards and arbitration agreements and subject to the ***Act*** applies in Prince Edward Island. Section 4 of the ***Act*** states, subject to the ***Act***, the Model Law applies to international commercial arbitration agreements and awards.

[27] Article 5 of the Uncitral Model Law provides that "in matters governed by this law, no court shall intervene except where so provided in this law".

[28] Relevant provisions of the Model Law are:

> Article 1. *Scope of application*
>
> (1) This law applies to international commercial arbitration, subject to any agreement in force between this State and any other State or States.
>
> . . .
>
> (3) An arbitration is international if
>
> (a) the parties to an arbitration agreement have, at the time of the conclusion of that agreement, their places of business in different States; or...
>
> . . .
>
> Article 5. *Extent of court intervention*
>
> In matters governed by this Law, no court shall intervene except where so provided in this Law.
>
> . . .
>
> Article 7. *Definition and form of arbitration agreement*
>
> (1) "Arbitration agreement" is an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not. An arbitration agreement may be in the form of an arbitration clause in a contract or in the form of a separate agreement.
>
> . . .
>
> Article 16. *Competence of arbitral tribunal to rule on its jurisdiction*
>
> (1) The arbitral tribunal may rule on its own jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement. For that purpose, an arbitration clause

which forms part of a contract shall be treated as an agreement independent of the other terms of the contract. A decision by the arbitral tribunal that the contract is null and void shall not entail ipso jure the invalidity of the arbitration clause.

(2) A plea that the arbitral tribunal does not have jurisdiction shall be raised not later than the submission of the statement of defence. A party is not precluded from raising such a plea by the fact that he has appointed, or participated in the appointment of, an arbitrator. A plea that the arbitral tribunal is exceeding the scope of its authority shall be raised as soon as the matter alleged to be beyond the scope of its authority is raised during the arbitral proceedings. The arbitral tribunal may, in either case, admit a later plea if it considers the delay justified.

(3) The arbitral tribunal may rule on a plea referred to in paragraph (2) of this article either as a preliminary question or in an award on the merits. If the arbitral tribunal rules as a preliminary question that it has jurisdiction, any party may request, within thirty days after having received notice of that ruling, the court specified in article 6 to decide the matter, which decision shall be subject to no appeal; while such a request is pending, the arbitral tribunal may continue the arbitral proceedings and make an award.

. . .

RECOGNITION AND ENFORCEMENT OF AWARDS

Article 35. *Recognition and enforcement*

(1) An arbitral award, irrespective of the country in which it was made, shall be recognized as binding and, upon application in writing to the competent court, shall be enforced subject to the provisions of this article and of article 36.

(2) The party relying on an award or applying for its enforcement shall supply the duly authenticated original award or a duly certified copy thereof, and the original arbitration agreement referred to in article 7 or a duly certified copy thereof. If the award or agreement is not made in an official language of this State, the party shall supply a duly certified translation thereof into such language.

Article 36. *Grounds for refusing recognition or enforcement*

(1) Recognition or enforcement of an arbitral award, irrespective of the country in which it was made, may be refused only

(a) at the request of the party against whom it is invoked, if that party furnishes to the competent court where recognition or enforcement is sought proof that,

(i) a party to the arbitration agreement referred to in article 7 was under some incapacity; or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made; or

(ii) the party against whom the award is invoked was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case; or

(iii) the award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, that part of the award which contains decisions on matters submitted to arbitration may be recognized and enforced; or

(iv) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties or, failing such agreement, was not in accordance with the law of the country where the arbitration took place; or

(v) the award has not yet become binding on the parties or has been set aside or suspended by a court of the country in which, or under the law of which, that award was made; or

(b) if the court finds that

(i) the subject-matter of the dispute is not capable of settlement by arbitration under the law of this State; or

(ii) the recognition or enforcement of the award would be contrary to the public policy of this State.

[29] The general principles of the Model Law have been set forth by Lax J. in the case of ***Re Corporacion Transnacional de Inversiones, S.A. de C.V. et al. and STET International, S.p.A. et al.*** (1999), 45 O.R. (3d) 183:

> *Governing Principles of the Model Law*
>
> The Model Law is a collaborative effort among nations to facilitate the resolution of international commercial disputes through the arbitral process. It is in force in numerous jurisdictions around the world, including Ontario and Mexico. Article 5 of the Model Law expressly limits the scope for judicial intervention except by application to set aside the award or to resist enforcement of an award under one or more of the limited grounds specified in Articles 34 or 36. Under Article 34 of the Model Law, the applicants bear the onus of proving that the awards should be set aside. If the applicants fail to satisfy this onus, Articles 35 and 36 of the Model Law expressly require this court to recognize and enforce the awards.
>
> The broad deference and respect to be accorded to decisions made by arbitral tribunals pursuant to the Model Law has been recognized in this jurisdiction by the Ontario Court of Appeal in *Automatic Systems Inc. v. Bracknell Corp.* (1994), 18 O.R. (3d) 257 at p. 264, 113 D.L.R. (4th) 449 at p. 456:
>
> > The purpose of the United Nations Conventions and the legislation adopting them is to ensure that the method of resolving disputes in the forum and according to the rules chosen by the parties, is respected. Canadian courts have recognized that predictability in the enforcement of dispute resolution provisions is an indispensable precondition to any international business transaction and facilitates and encourages the pursuit of freer trade on an international scale: *Kaverit Steel & Crane Ltd. v. Kone Corp.* (1992), 87 D.L.R. (4th) 129 at p. 139, 85 Alta. L.R. (2d) 287 (C.A.).
>
> See also, *Noble China Inc. v. Lei* (1998), 42 O.R. (3d) 69 at pp. 87-88 and 89, 42 B.L.R. (2d) 262 (Gen. Div.).
>
> Similar language is found in jurisprudence from other jurisdictions. In *Quintette Coal Ltd. v. Nippon Steel Corp.*, [1911] 1 W.W.R. 219, 50 B.C.L.R. (2d) 207 (C.A.) (leave to appeal to S.C.C. refused (1990), 50 B.C.L.R. (2d) xxvii), the court refused to set aside an international commercial arbitration award under legislation comparable to the ICAA. The court provided these comments on the standard of review at p. 229:

> We are advised that this is the first case under the British Columbia Act which a party to an international commercial arbitration seeks to set aside an award. It is important to parties to future such arbitrations and to the integrity of the process itself that the court express its views on the degree of deference to be accorded the decision of the arbitrators. The reasons advanced in the cases discussed above for restraint in the exercise of judicial review are highly persuasive. The "concerns of international comity, respect for the capacities of foreign and transnational tribunals and sensitivity to the need of the international commercial system for predictability in the resolution of disputes" spoken of by Blackmun J. are as compelling in this jurisdiction as they are in the United States or elsewhere. It is meet, therefore, as a matter of policy, to adopt a standard which seeks to preserve the autonomy of the forum selected by the parties and to minimize judicial intervention when reviewing international commercial arbitral awards in British Columbia.
>
> The reference to the words of Blackmun J. is a reference to the decision of the United States Supreme Court in *Mitsubishi Motors v. Soler Chrysler-Plymouth Inc.* 473 U.S. 614. To the same effect is the decision of the English House of Lords in *Antaios Compania Naviera S.A. v. Salen Rederierna A.B.*, [1984] 3 All E.R. 229 at p. 232, [1984] 3 W.L.R. 592.

[30] Grow Biz states that it had a contract in writing containing a submission to arbitration that the ***Act*** applies to this arbitration and that the applicant is entitled to have the arbitral award recognized and enforced by this court.

[31] The respondents take the position that Tanton was under some incapacity when the franchise agreement was signed, that she was not given proper notice of the arbitration proceeding, that the award does not fall within the terms of the submissions to arbitration and that she was not aware she was accepting personal responsibility when she signed the personal guarantee. In addition, the respondents state the arbitration award was not in accordance with the laws of Prince Edward Island and that enforcement of the award would be against public policy.

FINDINGS

[32] The issue of Tanton's incapacity relates to her assertion that she did not have the opportunity to obtain legal counsel when the franchisee agreement was signed or when the personal guarantee was signed. She asserts that she had no experience in the field of franchising, nor in running a business, and consequently Grow Biz should have made certain that Tanton had independent

legal advice. As I have already stated, there is clear evidence that Tanton had legal advice, or had the opportunity to receive legal advice, when she signed the franchise agreement. Consequently, I shall only make passing reference to the respondents' submissions on this issue.

[33] The respondents rely on the case of ***Ronald Elwyn Lister Ltd. v. Dunlop Canada Ltd.*** , [1982] 1 S.C.R. 726 for the principle that a party in a superior position owes an obligation to the "weaker" party. That principle must, however, be tempered in the case of a party having legal counsel. At p. 745, Estey J., in delivering the judgment of the Court, stated:

> Where parties experienced in business have entered into a commercial transaction and then set out to crystallize their respective rights and obligations in written contract drawn up by their respective solicitors, it is very difficult to find or to expect to find a legal principle in the law of contract which will vitiate the resultant contracts. Certainly where the parties have capacity in law to enter into the contract, where the terms of the contract are clear and unambiguous, where there is a valid consideration passing between the parties, and where there is no evidence of oppression or operative misrepresentation, the law recognizes no principle which fails to enforce the validity of such a contract. No doubt the law of contract in this connection reflects the needs for certainty in commerce. This is particularly true where, as here, the two contracts, at the time of commencement of action, are not executory but have been acted upon and performed by the parties. Where, as here, the persons engaged in the commerce at hand were fully and continuously in contact with their legal advisors, there is neither need not warrant for the intervention of the courts to remake or set aside these contracts.

[34] The respondents cite the case of ***Aamco Transmissions Inc. v. Kunz*** (1991), 97 Sask. R. 5 where the Saskatchewan Court of Appeal decided not to enforce an award made in the United States. That case can be distinguished as the court concluded the contract had not been negotiated, but was signed by a person who was not in an equal bargaining position with the other party. Consequently, the contract was interpreted against the grantor. As I have already stated, I do not find that Tanton was a person who was in an unequal bargaining position.

[35] I do not find that the respondent Tanton was under any incapacity when she entered into the franchise agreement. There was no evidence of oppression, high pressure tactics or misrepresentation. The allegation of misrepresentation relates to matters that were set forth in the agreement. Having found that Tanton was fully aware, or could have been fully aware, of the contents of the agreement, her argument of misrepresentation fails.

[36] The respondents also submit that s. 36(1)(a)(ii) of the Uncitral Model Law provides that recognition or enforcement of an arbitral award will be refused if the party against whom the award is invoked was unable to present her case. Tanton states she was unable to present her case because the hearing was held in Minneapolis and she could not afford to travel to Minneapolis.

[37] The simple answer to these submissions is that the franchise agreement stated the hearings would be held in Minneapolis and the fact she could not go is not the responsibility of the applicant.

[38] The decision of the Ontario Court of Appeal in ***Corporacion Transnacional de Inversiones, S.A. de C.V. v. STET International, S.p.A.*** (2000), 49 O.R. (3d) 414 is pertinent to the position here being argued. At paragraph 7 the Court stated:

> [7] Finally, had the appellants not withdrawn from the arbitration, they would have had the same access to the information, including the agreements, as did the tribunal during the testimony of the respondents' witness. This is not speculation, as argued by the appellants. It follows from the terms of Article 25(c) of the Model Law and Article 15(2) of the International Chamber of Commerce Rules of Arbitration. The latter provides that if one of the parties is absent without valid excuse the arbitrator shall proceed with the arbitration and "such proceedings shall be deemed to have been conducted in the presence of all parties". <u>It hardly offends our notions of fundamental justice if a party that had the opportunity to present its case and meet the opposing case forfeits that opportunity by withdrawing from the arbitration.</u> This argument is entirely without merit. [Emphasis added]

[39] Article 25(c) of the Uncitral Model law provides:

> Article 25. *Default of a party*
>
> Unless otherwise agreed by the parties, if, without showing sufficient cause...
>
> (c) any party fails to appear at a hearing or to produce documentary evidence, the arbitral tribunal may continue the proceedings and make the award on the evidence before it.

[40] Tanton states that she was unable to attend the arbitration hearing because she could not afford to go. She has not placed any evidence before the Court to substantiate her submission that she lacked funds. The Court cannot

be expected to accept the bold statement of Tanton that she lacked funds. Had she attended, she would have had the opportunity of determining whether the arbitration procedure was in accordance with the laws of Prince Edward Island. As stated by the trial judge, Lax J., in ***Corporacion Transnacional de Inversiones, S.A. de C.V. v. STET International, S.p.A.***, (1999), 45 O.R. (3d) 183 at p. 204, there is a "powerful presumption" that the tribunal acted within its powers.

[41] A further submission put forth by the respondents is that recognition and enforcement of the award deals with matters beyond the scope of the submissions to arbitration, or the arbitral procedure was not in accordance with the agreement of the parties, contrary to Article 36(i)(iii) and (iv) of the Uncitral Model Law.

[42] The respondents state the arbitration award relating to "continuing fee" owing to the applicant was inaccurately calculated. Clause 5(a) of the franchise agreement provides that the franchisee will, for the term of the agreement, pay the franchisor a continuing fee of 5% of the franchisee's gross sales. The obligation is to remain in effect until the agreement has expired, or is terminated in accordance with the agreement. The respondents state that the arbitrator calculated the continuing fees beyond the dates of the expiration of the termination of the franchise agreement.

[43] In the allegations placed before arbitration, it is stated that Grow Biz, by letter dated July 10, 1997, gave notice of termination pursuant to section 15 of the franchise agreement to D.L.T. and Tanton. The arbitrator, in his award, calculated the continuing fees due from October 1, 1996 to October 31, 1997.

[44] Grow Biz states that if the arbitrator incorrectly calculated the continuing fees, then that part of the award could be separated so that the correct fees might be calculated. I agree with the respondents that the arbitrator erred in calculating the continuing fees. The continuing fees should only have been calculated up to the date of the termination of the agreement, July 10, 1997. The award should be amended to reflect the correct calculation.

[45] The respondents also argue that the arbitration award does not indicate that the arbitration procedure was in accordance with the laws of Prince Edward Island. Clause 20(d) of the franchise agreement provides that the agreement and the franchise relationship will be governed by the laws of the state in which the franchise location is located.

[46] The arbitration award does not state whether the procedure used was in accordance with the laws of Prince Edward Island. On the other hand, the respondents do not state what laws of Prince Edward Island might not have been followed. The burden of proof being on the respondents, they should have set forth the laws of Prince Edward Island that were breached by the arbitrator.

[47] The respondents also submit that the award should not be enforced on the ground of public policy. The arguments upon which the respondents base their public policy submission is, again, the inequality of bargaining power submissions. For the reasons already stated I must find that there was no inequality of bargaining power in this case.

[48] A further submission made at the hearing on behalf of the respondents is that the award should not have been against D.L.T. due to the fact that when the assignment of the franchise agreement was made from Tanton to D.L.T., with the consent of Grow Biz, D.L.T. was not an incorporated company. The assignment was dated July, 1994, while D.L.T. was not incorporated until October 4, 1994.

[49] The respondents appeared to take the position that D.L.T. should not be found to have been assigned the franchise because D.L.T. was not incorporated until October 4, 1994. Tanton's evidence on discovery was that she did not know she was going to use the name D.L.T. until she went to her lawyer on her return from Minneapolis.

[50] This is another instance of Tanton becoming confused over the times when certain events happened. While I have found that Tanton signed the franchise agreement in June, she states she signed it, and the assignment to D.L.T., in July. If she did so, then the name D.L.T. was known to her at that time. She contradicts herself by saying that she did not know of the name D.L.T. until she returned from Minneapolis in July.

[51] The applicant has cited the case of ***Heinhuis v. Blacksheep Charters Ltd. et al.*** (1987), 46 D.L.R. (4d) 67 (B.C.C.A.). There, Heinhuis entered into a contract with Hansen and Klaus to buy land for $260,000 owned by Hansen. Heinhuis agreed to pay for the property by cash, $200,000, and the transfer of a boat which he owned. The boat was valued at $200,000, so Hansen agreed to give a chattel mortgage on the boat back to Heinhuis. To reduce taxes it was agreed that Heinhuis would incorporate Blacksheep Charters Ltd., to which the

boat would be transferred, and the shares in the company would be transferred to Klaus. The company would then execute the chattel mortgage to Heinhuis.

[52] Heinhuis paid the cash, transferred the boat and a chattel mortgage from Blacksheep was registered, six days before Blacksheep was incorporated. Blacksheep took possession of the boat and made two payments on the chattel mortgage before defaulting and Heinhuis seized the boat. The proceedings were to determine who was the rightful owner of the boat, as a company, Echo Bay Developments Ltd. had, through the course of a number of transactions, obtained a bill of sale for the boat.

[53] Heinhuis contended that he was the rightful owner because of his seizure under the chattel mortgage. The defendants contended the chattel mortgage never bound Blacksheep because it was made before the company was incorporated, resulting in Heinhuis' seizure being ineffective and consequently Echo Bay had good title.

[54] McLachlin J.A., in her decision at pp. 69, 71 and 72, stated:

> *Enforceability of the pre-incorporation contract*
>
> A pre-incorporation contract may be enforced where the company and the other party to the contract make a new contract after incorporation on the same terms as the pre-incorporation contract:...
>
> The real issue in this case is what is required to establish a new post-incorporation contract binding on the company. The defendants say that a new offer and acceptance or some sort of formal agreement is required. The plaintiff, on the other hand, says that conduct of Blacksheep and himself affirming such a contract after incorporation suffices. Part performance of the contract, he submits, constitutes conduct sufficient to establish a post-incorporation contract.
>
> In *Massey Productions Ltd. v. Rocky Mountain Society for Public Art*, October 19, 1984, CA002167, Vancouver [summarized 28 A.C.W.S. (2d) 318], this court, *per* Nemetz C.J.B.C., accepted the proposition that "a pre-incorporation contract is enforceable if the parties, by their conduct, show an intention to be bound by a new post-incorporation contract containing terms identical to those in the pre-incorporation contract".
>
> The authorities establish that an intention to be bound by the pre-incorporation contract may be inferred where the pre-incorporation contract has been partly performed by the transfer of assets to and acceptance of those assets by the company. ...

. . .

> I am satisfied that Blacksheep, having taken possession of the vessel and treated it as its own pursuant to the pre-incorporation contract, must be treated as also having accepted the obligation contemplated by the contract that it give back to Heinhuis a chattel mortgage on the vessel in the sum of $140,000. Blacksheep could not take the part of the contract that benefits it, while rejecting the part that required it to pay for the benefit. If, after its incorporation, it took part of the contract, it must be considered to have taken it all...
>
> . . .
>
> ...Mutual written or oral promises may not be the only way in which a contract can arise: see Waddams, *The Law of Contracts*, 2nd ed. (1984), p. 12; Treitel, *The Law of Contract*, 4th ed. (1975), p. 7. As Treitel puts it, the first requisite of a contract is that the parties have made an agreement which is certain and final. When such an agreement, whether deduced from words or conduct, is found, together with consideration to support it, a contract exists. In the case at bar, the conduct of Mr. Heinhuis and Blacksheep demonstrates clearly that they intended to be bound by the pre-incorporation contract. Heinhuis intended to surrender and did in fact surrender possession and title to the vessel, in return for which the company intended to assume and did in fact assume the obligation under the chattel mortgage. The only reasonable inference is that Blacksheep and Heinhuis contractually agreed to accept these mutual obligations.

[55] In the present case the appellant states that proof that D.L.T. intended to be bound by the terms of the assignment can be found from the following:

1. The financial statements for the years 1995, 1996 and 1997 for the Once Upon a Child franchise are all prepared on behalf of D.L.T.

2. The financial statement of D.L.T. for the year 1997 shows the franchise being an asset of D.L.T. Further, the financial statement for 1997 in the Schedule of Expenses lists “royalty fees and charges” as an expense of D.L.T. Further, in the notes to the financial statement it is noted that the franchise is a capital asset of D.L.T. to be amortized over a ten year period.

3. D.L.T. and Tanton initiated legal proceedings against the applicant in the Supreme Court of Prince Edward Island in relation to the franchise agreement. The remedy being sought was, among other things, rescission of the franchise agreement. Under this legal proceeding,

D.L.T. is seeking relief under the franchise agreement.

4. D.L.T. never refuted the assignment agreement to D.L.T.

5. Debbie Tanton held out that "her company" (affidavit of Debbie Tanton sworn August 6, 1999) D.L.T., owned the franchise.

6. The lease of the premises from where the franchise operated was in the name of D.L.T.

[56] As in the ***Heinhuis*** case, D.L.T. took possession of the lease and carried on the franchise business until the lease was terminated. D.L.T. must now accept the obligations set forth under the franchise agreement. There can be no question that it was the intent of D.L.T. to accept those obligations.

[57] The parties also sought clarification of clause 18B of the franchise agreement which provided that the franchisee would not for a period of one year after the expiration or termination of the agreement operate a children's clothing store. The applicant states the one year period should commence to run from the date of my decision. I do not agree with this interpretation and cannot see where it has any basis. The franchise agreement is quite clear that the restriction contained in clause 18B commences at the time of the termination of the agreement.

[58] The respondent, Tanton, also submits that when she signed the personal guarantee of the obligations that D.L.T. assumed when it received the assignment, she did not have independent legal advice.

[59] The personal guarantee and agreement was signed by Tanton at the time when she made the assignment to D.L.T. In this guarantee, Tanton guaranteed the performance of D.L.T. to all terms of the franchise agreement.

[60] Tanton submitted that she cannot be held liable under this guarantee as she signed for a company that did not exist at the time she executed the document. I have already dealt with this argument and find it has no weight.

[61] A further argument put forth is that the guarantee was not witnessed. She does admit she signed the guarantee. Consequently, whether or not it was witnesses is of no consequence. I will assume it was signed by her without legal advice, as it appears it was given to her for signature when she was in

Minneapolis in July, 1994. However, I am not of the opinion that she was unaware of its contents. In Tanton's personal profile which she made out for the franchise application, she stated that her education was "college/business". She went on to say:

> "...my husband was a past entrepreneur and I worked in the last four businesses he owned and I feel I have acquired a lot of experience dealing with the public and employees, as well as financial dealings with each business. I also have an accounting background, a graduate of a business college...".

[62] Also, in her personal profile, Tanton indicated that she had been the manager of four businesses, which I assume were her husband's businesses, and executive director of a non-profit organization.

[63] It is obvious that Tanton held herself out to be a person acquainted with business practices. Further, Tanton was not alone in her business dealings with the applicant, as Tanton's husband accompanied her on both trips to Minneapolis. It is also evident that Tanton's husband was with her when the documents were signed in Minneapolis.

[64] Tanton, in her discovery evidence, stated that the applicant wanted her husband to sign the agreement. She stated "Peter said, no, this is Debbie's business. I am not signing any agreement. It's her business solely".

[65] The personal guarantee signed by Tanton to cover D.L.T.'s obligation is certainly not a complicated document and is one that could be easily read and understood by a person with Tanton's education and business experience. The guarantee reads:

> PERSONAL GUARANTY AND AGREEMENT TO BE BOUND PERSONALLY BY THE TERMS AND CONDITIONS OF THE FRANCHISE AGREEMENT
>
> In consideration of the assignment of the FRANCHISE AGREEMENT and ADDENDUM by FRANCHISOR from the undersigned to D.L.T. HOLDINGS, INC. and for other good and valuable consideration, the undersigned, for himself, his heirs, successors, and assigns, does become surety and guaranty for the payment of all amounts and the performance of the covenants, terms and conditions in the FRANCHISE AGREEMENT, to be paid, kept and performed by the FRANCHISEE.
>
> Further, the undersigned, hereby agrees to be personally bound by each and every condition and term contained in this FRANCHISE

> AGREEMENT including but not limited to the non-compete provisions and agree that this PERSONAL GUARANTY should be construed as though the undersigned executed a FRANCHISE AGREEMENT containing the identical terms and conditions of the FRANCHISE AGREEMENT.

[66] This is a simple guarantee. Tanton states in her affidavit of September 15, 1999 that she did not know what she was signing. I cannot believe that she did not know she was signing a guarantee.

[67] Ellen MacDonald J. in ***Ellis v. Subway Franchise Systems of Canada Ltd.,*** et ors, unreported (Ont. Ct. of Justice), (May 15, 2000, Court file #99-CL-3532), pointed out that as a general proposition, in the absence of fraud or misrepresentation, a person is bound by their agreement. Fraud or misrepresentation are not alleged here. Tanton states her inability to understand what she was signing makes it unconscionable to uphold the guarantee of D.L.T.'s obligations. MacDonald J. at para. 33 stated the proper test for unconscionability was laid down by Schroeder J.A. in ***Mundinger v. Mundinger*** (1968), 3 D.L.R. (3d) 338 at pp. 341-2 (Ont. C.A.), aff'd (1970), 14 D.L.R. (3d) 256*n* (S.C.C.):

> The governing principle applicable here was laid down by this Court in the oft-cited case of *Vanzant v. Coates* (1917), 40 O.L.R. 556, 39 D.L.R. 485 [(C.A.) (five member panel)]. It was there held that the equitable rule is that if the donor is in a situation in which he is not a free agent and is not equal to protecting himself, a Court of Equity will protect him, not against his own folly or carelessness, but against his being taken advantage of by those in a position to do so because of their position. In that case the circumstances were the advanced age of the donor, her infirmity, her dependence on the donee; the position of influence occupied by the donee, her acts in procuring the drawing and execution of the deed; and the consequent complete change of a well-understood and defined purpose in reference to the disposition of the donor's property. It was held that in those circumstances the onus was on the plaintiff to prove by satisfactory evidence that the gift was a voluntary and deliberate act by a person mentally competent to know, and who did know, the nature and effect of the deed, and that it was not the result of undue influence. That onus had not been discharged; and it was therefore held to be unnecessary for the defendant to prove affirmatively that the influence possessed by the plaintiff had been unduly exercised.
>
> The principle enunciated in *Vanzant v. Coates, supra,* has been consistently followed and applied by the Courts of this Province and the other common law Provinces of Canada. The effect of the relevant decisions was neatly stated by Professor Bradley E. Crawford in a commentary written by him and appearing in 44 Can. Bar Rev. 142 (1966)

at p. 143, from which I quote the following extract:

> If the bargain is fair the fact that the parties were not equally vigilant of their interest is immaterial. Likewise if one was not preyed upon by the other, an improvident or even grossly inadequate consideration is no ground upon which to set aside a contract freely entered into. It is the combination of inequality and improvidence which alone may invoke this jurisdiction. Then the onus is placed upon the party seeking to uphold the contract to show that his conduct throughout was scrupulously considerate of the other's interests.

This correctly sets forth the effect of the decisions bearing upon this and like problems and I adopt it as an accurate statement of the law.

[68] MacDonald J. also referred to four American cases where a franchise agreement was held not to be unconscionable. She stated at para. 37:

> [37] In each of these American cases, many of the same issues were raised which have been raised in this case. In *Stuart*, as in this case, the franchisee had notice, through the offering circular, of the arbitration agreement prior to entering into the franchise agreement. Likewise, in that case, the Court stated that the franchisees were "business people," not "vulnerable customers or helpless workers"; as such the franchisees were not "forced to swallow unpalatable terms" but chose to do so, with their eyes wide open. In *Hamilton*, the franchisee raised the high costs of arbitration, including the costs of travel from the New Jersey franchise store to Connecticut. In both *Hamilton* and *Stuart*, the franchisee argued that the AAA was biased in favour of Subway (Doctor's Associates Inc.) because the AAA relied on the franchisor for repeat business. In both these cases, the 2nd Circuit court rejected these submissions for the same reasons, that the onerous provisions of the franchise agreements were clear on their face and the franchisee was free to investigate before entering into the agreement, and thus it was not unconscionable to hold the franchisee to the terms of the franchise agreement.

[69] There is a vast difference here between comprehending a twenty-three page franchise agreement versus a two paragraph agreement. I do not see Tanton as being a vulnerable person, a helpless person, or a person without business experience.

[70] I find it of some significance that Tanton's husband did not give any evidence. One would think that if Tanton's situation was as she described, her husband would have been able to verify Tanton's evidence.

[71] I might add also at this juncture that the evidence before me was only by

way of affidavit.

[72] In relation to the guarantee for D.L.T., if there was any inequality of bargaining power, it was very slight. MacDonald J. also stated in the ***Ellis*** case at para. 39:

> [39] Ms. Ellis does not make out a case for unconscionability. Therefore, she cannot not be relieved from their bargain. Although it could be said that there was inequality of bargaining power between the parties, the Subway Parties did not take undue advantage of it, nor did they exert undue influence over Ms. Ellis. Although Ms. Ellis was only a "small business" person and Subway is a large international corporation, and although the Franchise Agreement contains onerous terms for Ms. Ellis, such is the nature of franchise relationships. To a degree, each party takes advantage of the other. Ms. Ellis takes advantage of the Subway Parties' goodwill, trade-marks and infrastructure, and the Subway Parties take advantage of Ms. Ellis's personal investment and hard work. The advantage in such a franchise agreement is thus mutual, rather than unilateral, unequal, or undue. Equally, part of the consideration for the Franchise Agreement is the element of mutual advantage. The onerous terms of the Franchise Agreement are necessary in order to ensure that the franchisee does not erode the franchisor's goodwill. The contract's terms provide the franchisee with certainty and predictability...

[73] In the present circumstances, I cannot find that the applicant took advantage of Tanton and she has not made out her case for unconscionability.

[74] Finally, the respondents appear to have been making an allegation that the applicant made fraudulent and negligent representations in relation to the franchise agreement. However, I dealt with this matter when giving an earlier decision on September 18, 2000. It would be inappropriate for me to again address this issue.

[75] For all of the above reasons, I would allow the application with costs.

_____

C.J.

March 23, 2001