When buying a franchise, it’s buyer beware!

The recent decision of the Ontario Superior Court in Butera v. Mitsubishi features a number of interesting points, not the least of which involves the importance of doing one’s homework before opening a new-car franchise.

From a legal perspective, the case is interesting because it highlights the difficulty in pinning liability for negligent misrepresentation on a manufacturer entering a new market.

In 2002, Butera, a young lawyer working in St. Catharines, Ont., applied to Mitsubishi Canada for a Mitsubishi dealership he wanted to open in nearby Niagara Falls.

In the proforma sales forecasts that he included with his application, he forecast that he would sell 180 new and 125 used vehicles in an average year.

Ultimately, he signed a dealer agreement with Mitsubishi and opened up.

By 2003, less than three years later, he claimed that his losses to date were about $500,000 and growing.

His dealership stopped selling cars in October, 2005, but maintained a service business. It stopped carrying his losses to date were about $500,000 and growing.

Secondly, the court found that he knew or should have known the distinction between fleet sales and current sales and bore the burden of making further inquiries if he felt it important.

Finally, the court determined that less than one per cent of total sales of Mitsubishi cars in the United States during the relevant period were sold under the zero, zero, zero financing program.

The important legal issue of the impact of a possible misrepresentation by Mitsubishi as to projected sales was determined with reference to a clause in the dealer agreement usually referred to in legal circles as an “en- tire agreement” clause.

The entire agreement clause is now almost universal in these types of cases. It specifically provided that the written agreement constituted the entire agreement between the parties and superseded any and all prior written or oral agreements or understandings. This particular clause even provided that: “Dealer agrees that any oral statements of any MMSCAN personnel shall be of no force or effect and that Dealer has not relied on any such oral statements in entering into this Agreement.”

The court found that this clause directly impacted the heart of Butera’s claim, which was that Mitsubishi misrepresented the future prospects of sales of its cars in Canada based on its past performance in the United States.

As a result of the entire agreement clause, the court found that this was not a viable argument even if Mitsubishi’s representatives had made misrepresentations.

There is another aspect of the case relating to the alleged misrepresentations that is worth noting.

In law, a misrepresentation can only form the basis of a claim if it is a statement relating to an existing and ascertainable fact.

Courts have decided that statements about prospective sales or other future events are merely expressions of opinion about the future.

If a vendor provides a forecast and the forecast results are not achieved, the forecast will not constitute an untrue statement of a material fact as a matter of law.

It probably will not constitute a misrepresentation giving rise to liability. If the vendor negligently misrepresents existing facts, that may be a different story – unless an entire agreement clause applies.

But even an entire agreement clause won’t shield a vendor from an outright lie.

Butera was buying into what was essentially a new venture. He had been buying an existing store and had misrepresentations been made to him about the sales results for the store to date, the result may well have been different if that information had been false.

So, when starting up a new venture, take extra care and keep the following in mind:

• When a manufacturer provides a forecast as to future results, don’t assume that this will give rise to liability in the event that the forecasts are not met.

• An entire agreement clause will protect a vendor from liability for negligent misrepresentation.

In other words, it’s buyer beware!

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