Healthy Living Marketing Pte Ltd v Jeanrich Marketing Pte Ltd
[2002] SGHC 239

Case Number : Suit 600014/2001

Decision Date : 14 October 2002

Tribunal/Court : High Court

Coram : Lee Seiu Kin JC

Counsel Name(s) : Ramesh Appoo and Nagaraja S Maniam (Brij Rai & RA Anthony) for the plaintiffs; Leonard Loo Peng Chee and Edwin Loo (Leonard Loo & Co) for the defendants

Parties : Healthy Living Marketing Pte Ltd — Jeanrich Marketing Pte Ltd

Judgment

GROUNDS OF DECISION *Cur Adv Vult*

1 The Plaintiffs are a company in the business of trading and importing goods. At all material times they were the sole distributors in Singapore for Bionaire air circulators ("Bionaire fans"). An air circulator is a high velocity fan that is capable of moving a large volume of air. The Bionaire fans are manufactured by Bionaire International BV, a Dutch company. The Defendants are a company in the business of marketing and trading.

2 Sometime in June 1998 BIBV received an inquiry from a company in Singapore concerning agency rights for the Bionaire fans. In accordance with their practice on such matters, BIBV passed it to the Plaintiffs in Singapore for them to handle. The Plaintiffs' General Manager, Chong Ann Sin ("Chong"), contacted Witzan Tirtazana ("Witzan"), the Defendants' director. Witzan, an Indonesian businessman, told Chong that he was interested in selling the Bionaire fans in Singapore and Indonesia. Chong told him that the Plaintiffs were the sole distributors of the products in Singapore only. Chong and Witzan began negotiations on the terms of a sole agency agreement ("the Agreement") for the Singapore market.

3 As Witzan did not have a corporate vehicle in Singapore to undertake the business, he invited his friend, Richard Tay Chor Teng ("Tay"), to be his partner in the venture. They agreed to share equally in the costs and profits. They agreed to use the Defendants, a company owned by Tay, as the contracting party with the Plaintiffs. The parties eventually agreed upon the terms of the Agreement and it was signed on 15 July 1998. Two days later, on 17 July 1998 the Defendants placed on order for 320 units of Bionaire fans and paid a deposit of $15,000 to the Plaintiffs. The shipment arrived on 21 August 1998 and the Defendants then paid the balance sum of $16,971.

4 The Bionaire fans could not be sold immediately because the Plaintiffs had not managed to obtain approval from the Productivity and Standards Board ("PSB") for the product to be sold in Singapore, a requirement under the law for such electrical products. Unfortunately for the parties, the PSB approval was not forthcoming over the next few months despite frantic efforts on the part of the Plaintiffs and the increasingly desperate entreaties on the part of the Defendants. The Plaintiffs had initially thought that PSB approval for the Bionaire fan could easily be obtained on the strength of a certificate issued by TUV, a European testing body. However it was only after they had made the application to PSB and after several rounds of correspondence and clarifications that they discovered that the European TUV certification was not recognised by PSB. But by then there was already a considerable delay. In the end the Plaintiffs decided to obtain certification by submitting the Bionaire fan for testing in Singapore, a process that took several more months. It was not until 31 December 1998 that the PSB approval was finally obtained.

5 Meanwhile the Defendants were getting desperate as their investment was literally locked up in the warehouse. They were keen to recoup their capital in this venture which they thought would have turned a quick profit. Witzan said that he was incurring interest in excess of 20% on the Indonesian Rupiah at the time. They began selling the Bionaire fans even before the PSB approval was obtained. This was the cause of considerable dispute between them and the Plaintiffs and things came to a head when on 22 October 1998 Tay, on the Defendants' behalf, wrote a most remarkable letter to the Plaintiffs' principal, BIBV.

6 The letter began by asking whether the Agreement, a copy of which was attached, was "recognised" by BIBV. It continued by saying that at the time they were appointed as authorised agent in July, the Defendants had indicated to the Plaintiffs their interest to expand to the

regional markets. Tay then accused Chong of making "connections" with those territories without the Defendants' knowledge. The letter then complained about the manner in which Chong had handled the affair in the following manner:

> We had placed a container of 320 units in July 98 … and to-date we have not heard from … Chong regarding [the PSB approval]. As you may or may not have known, such approvals are mandatory … and the penalty in terms of fine is severe. It has been more than 3 months since July that the attached document dated 21 October 1998 was then finally put forth to PSB … for application. We must bring to your attention that we have attempted empteen [sic] times to send our reminders and even plead with him to expedite the matter, however to our astonishment we were ever told to even stop selling the product. No official reply was received from him on letters sent … We have always the intention to continue to indent more containers as we are very confident of the upmarket product and your esteemed Company but this is subjected to [PSB's] acknowledgement and approval.
>
> On this note, we have to inform you that the heavy cost incurred in printing of the product brochures and warrantee cards was borne by us and no support was given whatsoever by [the Plaintiffs]. Right now, we are stuck with about 200 units of the Bionaire fan in the warehouse which we are unable to sell and yet we are accountable for the daily expenses accrued. A few of the big orders placed has to be cancelled and those established organisations who have expressed their interest, questioned our safety features in which we are not confident to handle and ultimately led to the lost of sales.

7 The sales manager of BIBV, Johannes Van Lent ("Lent") telephoned Chong and told him about Tay's letter. He faxed a copy to Chong on 27 October and requested him to deal with the matter. Chong was livid. This is what he said in his affidavit evidence in chief:

> 50. I was disgusted and embarrassed by what the Defendants had done and told Hans that I would look into the matter and ask the Defendants to explain their conduct. …
>
> 51. The Defendants' Richard Tay in his fax dated 22/10/98 to the Principal attached the Agreement dated 15/7/98, that Winston and I had signed and had the nerve to ask if the 'contract was recognised' by the Principal !! The Defendants in their fax to the Principals were going behind the Plaintiffs' back to question the Plaintiffs' capacity to sign the contract. They clearly undermined the Plaintiffs' position and showed a lack of good faith and trust.
>
> 52. Richard Tay further accused me of making connections with Asian regional markets without the Defendants' knowledge in an effort to prevent or hinder the Defendants' business. In the first place the Plaintiffs were only appointed by the Principals in the territory of Singapore. The Principal had appointed other Companies as their sole distributors in the other regional territories. Richard's vague accusation that I made ' connections with ' other territories is also false and made purely to discredit the Plaintiffs and me. In any event neither the Plaintiffs nor I were restricted in any way by the Agreement from doing business outside of Singapore and certainly were not obliged to inform the Defendants of their business activities. Richard Tay in making such an allegation was suggesting that the Plaintiffs or I were unethical or dishonest in doing business.
>
> 53. Richard Tay then went on to try and impress the Principal with his knowledge

> of the product and enclosed the letters dated 14/9/98 and 23/9/98 he had sent to the Plaintiffs regarding the products.

8 Chong said he telephoned Witzan and told him that such behaviour was completely unacceptable, i.e. writing behind the Plaintiffs' back and making untrue allegations about the Plaintiffs. He asked for a written explanation for their conduct to be sent to the Plaintiffs immediately. Chong said that he called Witzan again on 29 October and reminded him about the written explanation. Witzan does not deny that Chong called him about this. He said he asked Chong to take up the matter with Tay. However Tay seemed to have forgotten about this completely. This was the exchange in his cross-examination:

> Q: After this letter was sent, did you receive any phone call from Chong?
>
> A: No.
>
> Q: Did you receive a call from Witzan telling you that Chong had called him over this letter?
>
> A: Cannot remember.
>
> Q: Did Witzan tell you that Chong wanted a written explanation for the letter?
>
> A: Cannot remember.
>
> Q: Witzan said that Chong called him after this letter and that he asked you to handle the matter.
>
> A: Cannot remember.
>
> Q: Did Witzan ask you why you had sent this letter to BIBV?
>
> A: No. We had no discussion on that. He left the day-to-day running to me.

The last answer seems to suggest a rather laid-back attitude by Witzan over this matter.

9 By 11 November 1998, having received no response from Witzan or Tay, Chong sent a letter to terminate the contract, invoking clause 12 of the Agreement which provides as follows:

> [The Plaintiffs] reserve the right to terminate the appointment of [the Defendants] if [the Defendants'] performance in productivity or conduct is deemed to be unsatisfactory by [the Plaintiffs].

Chong said that both sides had clearly understood that it was essential to the Agreement that the Plaintiffs have a high level of trust and confidence in the Defendants. By writing the letter of 22 October to BIBV, the Defendants had acted in bad faith and destroyed the whole basis of the Agreement.

10 The Defendants' case is that Chong had promised them at the outset that the PSB approval would be obtained by the time the first shipment arrived. They claimed that they had emphasised to Chong during the negotiations that it was essential to have the PSB approval in order to sell the Bionaire fans and that Chong had assured them that the approval would be obtained by the time the goods arrived. When it was not, and the delay lengthened, they grew increasingly desperate. When Chong seemed to make no headway with the PSB approval they felt that it was reasonable to go directly to BIBV. They alleged that Chong's termination was made in bad faith, done in order to cover up the fact that he had promised timely delivery of the PSB approval and his inadequate handling of the matter.

11 The Defendants' case hinges on their allegation that Chong had promised them, or represented, that the PSB approval would be

obtained by the time the first shipment arrived. It is a reasonable story as there is no doubt that Chong was confident about the PSB approval at the time because he was rather surprised to learn later that the TUV Europe certificate was not acceptable to PSB. However if this promise was of such importance to the Defendants, they certainly did not reveal it in any of the contemporary documents. They did not mention it in any of the letters that they had sent to the Plaintiffs leading up to the termination. Indeed, they did not even mention this to BIBV in their 22 October letter. While they complained about Chong's incompetence in obtaining the approval, they chose to conceal Chong's promise to them upon which they had placed such great reliance at the outset.

12 Indeed, even when the Plaintiffs' former solicitors wrote to the Defendants on 17 March 1999 to demand for the return of the Bionaire fans, they did not complain about Chong's broken promise to obtain PSB approval by the first shipment. It was not until this action was commenced that this allegation surfaced.

13 As far as the witnesses are concerned I find Chong to be a reliable witness in the box whose answers in cross-examination were forthright, reasonable and logical, and consistent with the documents. On the part of the Defendants, Witzan's evidence is not altogether consistent with the surrounding facts, although he tried to give reasonable answers. He claimed to have left matters to Tay; yet when the first shipment arrived, it was he who was notified in Indonesia. Tay on the other hand did not hesitate to give answers that were completely contradicted by the contemporary documents. For example he said that Chong had given them the green light to sell the Bionaire fans notwithstanding that the PSB approval had not been given. Yet in his own letter to BIBV, the one dated 22 October, he said that Chong had told them to stop selling the fans. He had said that he knew it was an offence to sell the fans without the PSB approval and had emphasised this to Chong in order to pressure the latter to procure the approval as soon as possible. Yet he was later to sell more than half the fans before PSB approval was obtained. I have no hesitation in concluding that Tay's evidence is wholly unreliable.

14 I find as a fact that Chong had not made the alleged promise, and that at worst he might have exuded confidence at the time about the PSB approval. The nature of the Defendants' letter to BIBV is clear. They were not really interested in merely being the sole agent in Singapore – they were hoping for bigger things. The tone of the letter clearly suggests that they were taking the opportunity to undermine the Plaintiffs vis--vis BIBV in the hope that the latter would give them the distributorship instead. This was what Chong was upset about and this was the basis upon which he had terminated the Agreement.

15 Accordingly, I find that Chong had terminated the Agreement *bona fide* and his reason for doing so are within the contemplation of clause 12. In the premises the Plaintiffs are entitled, by an implied term of the Agreement, to the return at cost of the unsold goods remaining in the possession of the Defendants. The latter had refused to return those goods and had in fact sold them off for a profit. Accordingly the Defendants are in breach of this implied term of the Agreement.

16 Further, clause 11 of the Agreement provides that the Defendants shall not engaged in any business in competition with the Plaintiffs during the term of the Agreement and for a period of twelve months thereafter. By selling the Bionaire fans in competition with the Plaintiffs, they have breached this clause. Indeed the Defendants were putting the fans in the market at a much lower price than that being charged by the Plaintiffs' dealers.

17 Accordingly, I order the Defendants to:

> (1) render an account of the profits made by them in the sale of the fans after the Agreement was terminated on 11 November 1998 and to pay the Plaintiffs such profits, with interest at the statutory rate from the date of this judgment;
>
> (2) pay damages for breach of the non-competition clause in the Agreement in the sum of a token $1 in view of the fact that the Plaintiffs have not offered any evidence of the damage suffered by them;
>
> (3) pay the Plaintiffs' costs at the standard rate.

Sgd:

LEE SEIU KIN

JUDICIAL COMMISSIONER

SUPREME COURT