Sports Connection Pte Ltd v Deuter Sports GMBH
[2008] SGHC 109

Case Number : Suit 280/2005

Decision Date : 10 July 2008

Tribunal/Court : High Court

Coram : Andrew Ang J

Counsel Name(s) : Shahiran Ibrahim, V Rajasekharan and Lim Ker Sheon (Asia Law Corporation) for the plaintiff; Aqbal Singh A/L Kuldip Singh and Chong Siew Nyuk Josephine (UniLegal LLC) for the defendant

Parties : Sports Connection Pte Ltd — Deuter Sports GMBH

Commercial Transactions

Contract

10 July 2008 Judgment reserved.

Andrew Ang J:

1 The plaintiff, Sports Connection Pte Ltd, is a Singapore incorporated company whose activities include, *inter alia*, the importation, exportation, retail and the wholesale trade of various local and foreign brands of backpacks and other outdoor, camping and athletic products. The defendant, Deuter Sports GmbH, is a company registered in Germany which owns the Deuter trademark. The defendant's business activities include the manufacture, exportation and sale of backpacks and outdoor products under the Deuter trademark.

2 The plaintiff was the exclusive distributor of Deuter products in Singapore since 1992. By way of a letter of agreement dated 28 November 2002 ("the Letter of Agreement"), the defendant re-appointed the plaintiff as the exclusive distributor of Deuter products in Singapore and in several other Southeast Asian countries for a period of three years starting 1 January 2003. The Letter of Agreement provides as follows:

> Beginning January 1st, 2003, and for the next three years we hereby agree to give Sports Connections [*sic*] the exclusive rights to distribute Deuter products in Singapore, East/West Malaysia, Brunei, Thailand and Indonesia.
>
> During this time Sports Connections [*sic*] shall make every effort to promote and sell the Deuter products to achieve market penetration and high quality brand positioning. Each year (or more often if appropriate) both parties agree to an annual meeting to discuss the progress and business strategies in these markets.
>
> Products which are in competition with Deuter range of products may not be sold by Sports Connection without prior written consent from Deuter.
>
> Deuter agrees not to directly or indirectly execute any conflicting business with the current staff of Sports Connection during their employment or within a period of two (2) years after their employment termination.

This agreement continues until December 31st, 2005 and can be renewed, with signed confirmation, for continuous distribution rights no later than one month prior to this date. This agreement can be terminated by consent of both parties or if there is an essential change in the running of or financial situation of one of the businesses, which has the effect of influencing the results which the other party could legitimately expect from the execution of this agreement.

It is the intention of both parties to work together for the next three years towards a mutually beneficial business relationship.

3 By way of a letter dated 27 January 2005, the defendant terminated the Letter of Agreement on the grounds of:

(a) the reduction of the plaintiff's wholesale business from 500 retailers' accounts to 50 retailers' accounts;

(b) the plaintiff's excessive discounting of Deuter products over an extended period of time;

(c) the sale of competing products without obtaining the defendant's written consent; and

(d) an essential change in the running of the plaintiff's business and financial situation which had the effect of influencing the results which the defendant could legitimately expect.

4 The plaintiff commenced this suit alleging that the defendant had:

(a) wrongfully repudiated the Letter of Agreement;

(b) breached para 4 of the Letter of Agreement by employing the plaintiff's former General Manager; and

(c) unlawfully conspired with the plaintiff's former General Manager to damage the plaintiff's business with the sole or predominant purpose of injuring the plaintiffs.

On its part, the defendant counterclaimed for damages for the plaintiff's alleged breaches of the Letter of Agreement. The defendant also alleged that the plaintiff had breached its fiduciary duties as exclusive distributor and sought an account of profits.

5 Prior to the trial, the plaintiff decided not to pursue its claim for unlawful conspiracy. At the closing submissions stage, the claim for the defendant's alleged breach of para 4 of the Letter of Agreement was likewise dropped. In the premises, the issues which remain to be decided by the court are whether the defendant had wrongfully repudiated the Letter of Agreement and whether the defendant is entitled to relief under its counterclaim.

Whether the termination by the defendant was wrongful

6 It would perhaps be appropriate for the court to deal first with the plaintiff's alleged breaches of the Letter of Agreement. These breaches are, namely, the excessive discounting of Deuter products and the sale of competing products. As for the claim that the plaintiff was in breach of fiduciary duties as exclusive distributor, I note that some evidence on this issue had been led during cross-examination and that the claim had been set out in the defence and counterclaim. However, save for an oblique and passing remark at para [36] of the defendant's rebuttal submissions that the plaintiff had repeatedly breached its duties of good faith to the defendant, there were no other

references made therein to the fiduciary duties in contrast to the closing submissions).

7 In this regard, counsel for the defendant, Mr Aqbal Singh, had agreed that his closing submissions were to be replaced in its entirety by his rebuttal submissions (save where references were made to the closing submissions). In fairness to the plaintiff, I therefore did not have the liberty to refer freely to Mr Singh's closing submissions. In the circumstances, as I was not assisted by Mr Singh on the fiduciary duties issue, I took the view that Mr Singh was no longer pursuing the point.

The issue of excessive discounting

8 I turn first to the issue of excessive discounting. The defendant's main grouse here was that the plaintiff's excessive discounting of Deuter's products over an extended period of time was contrary to its obligation to position Deuter as a "high quality brand".

9 At the outset, I observe that the Letter of Agreement did not expressly prohibit the plaintiff from discounting Deuter products. Instead, what was agreed upon by the parties was that the plaintiff "*shall make every effort to promote and sell the Deuter products to achieve market penetration and high quality brand positioning*". It was only by way of the 17 January 2005 Amendment to the Letter of Agreement ("the Amendment") that the plaintiff agreed not to publicly offer any discount for Deuter products. Notwithstanding this, the Amendment allowed the plaintiff to offer an unadvertised discount of 20% at its retail outlets.

10 In my view, the plaintiff's obligation to position Deuter as a "high quality brand" was an inherently vague one and could not be objectively interpreted to mean that the plaintiff was to be prevented from discounting, or even excessively discounting, Deuter products. This is because, firstly, I do not see how the word "quality" has any inevitable correlation with the desired level of pricing. Secondly, it appears to me that Mr Singh has conceded that "ordinary discounting" was permissible (see Notes of Evidence, pp 98 and 99). If this was the case, where then is the line between permissible and impermissible discounts?

11 In the circumstances, I am of the opinion that the discounting of Deuter products by the plaintiff prior to the Amendment could not have been a breach of the Letter of Agreement. In any event, I am of the view that the defendant could not rely on the excessive discounting issue to terminate the distributorship as the Amendment had put to rest the parties' differing views over the matter.

The sale of competing products

12 It was an express term of the Letter of Agreement that "[*p*]*roducts which are in competition with Deuter range of products may not be sold by Sports Connection without prior written consent from Deuter*". In this regard, it should first be noted that the plaintiff and the defendant had a business relationship from 1992 and that the defendant knew, both before and after the Letter of Agreement was signed, that the plaintiff was selling products from various competing brands.

13 I also note that the distributorship agreement that was signed in 1999 (the one immediately preceding the Letter of Agreement) did not contain a non-competition clause. The clause was only added in the Letter of Agreement in 2003 when the plaintiff's exclusive distributorship was renewed for a further period of three years. Further, I accept that there existed an understanding between the parties that the competing products clause would not be "activated" if the plaintiff purchased US$1m worth of Deuter products annually (see Notes of Evidence, pp 249, 316 and 317). Based on such an understanding, the defendant therefore did not permanently and irrevocably waive the plaintiff's

obligations under the non-competition clause, and the defendant would not be prevented from activating the non-competition clause as and when the US$1m target was not met.

14 At para 24 of the plaintiff's closing submissions, it was submitted that the defendant's termination of the Letter of Agreement was premised on the defendant's expectation that the plaintiff would not be able to meet the US$1m target for the year 2005 and that the termination was accordingly premature. During cross-examination, the main defence witness, Mr William Hartrampf ("Mr Hartrampf"), agreed with counsel for the plaintiff, Mr Shahiran Ibrahim, that the plaintiff's failure to meet the purchase target in 2004 was not a reason for termination and that the defendant was instead relying on the plaintiff's anticipated failure to meet the 2005 purchase target as a ground for termination (see Notes of Evidence, p 399). On the face of it, Mr Hartrampf's evidence served to weaken the defendant's case (but as we shall see later, it would be of little relevance). Indeed, his oral evidence on this point did not tally fully with the documentary evidence in relation to the non-competition issue (which I will deal with in greater detail at paras [17] – [23] below). However, this is not to say that Mr Hartrampf was not a credible witness. On the contrary, I thought he had been honest and forthcoming, although at times confused.

15 I pause here briefly to consider the consequences of the plaintiff's failure to meet the US$1m target in 2004. Here, I did not think that the failure to meet the target would entitle the defendant to immediately terminate the Letter of Agreement forthwith or to seek retrospective damages. This was because implicit in the parties' understanding was that the non-competition clause would be "inactive" unless and until the plaintiff failed to meet a particular year's purchase target (see [13] above). Indeed, Mr Hartrampf had conceded that the failure to meet the US$1m target in 2004 could not by itself be a valid ground for termination (see Notes of Evidence, p 397). Thus, in my opinion, the parties' understanding meant that the plaintiff's failure to meet the purchase target merely entitled the defendant to activate the non-competition clause prospectively.

16 To my mind, however, it is one thing to say that the defendant would be entitled to terminate the Letter of Agreement immediately as a result of the plaintiff's failure to meet the US$1m target and another to say that the defendant would be entitled to prospectively invoke the non-competition clause. The distinction is clear and evident. Having examined both the oral and documentary evidence carefully, I thought that Mr Shahiran ought to have directed his inquiry to whether the defendant was entitled to activate the non-competition clause. In this regard, counsel seemed to have skipped a crucial step. Therefore, seen in this light, Mr Hartrampf's agreement with counsel that he was relying on the plaintiff's anticipated failure to meet the 2005 purchase target as a ground of termination did not assist the plaintiff's case, given that the defence's case had always been that the plaintiff's refusal to adhere to the non-competition clause constituted a repudiatory breach (see para [27] of the defendant's rebuttal submissions). Further, when counsel asked Mr Hartrampf whether "[the defendant] waived the violations through the year 2004", the response was: "[w]e were not terminating. We were not waiving" (see Notes of Evidence, p 393). What then was the defendant seeking to do? The answer is obvious: the defendant was only seeking to enforce the non-competition clause. Thus, speaking hypothetically, if the defendant had indeed been entitled to invoke the non-competition clause and the plaintiff complied, the latter would then not be in breach. But as we shall we, that was not the case here.

17 This leads us to the question of whether the US$1m target had in fact been met for the year 2004. The defendant's position was that the target was not met while the plaintiff claimed that the target would have been met if the calculation included orders made in late 2004 for delivery in 2005. In my view, the purported purchase orders dated 17 November 2004, DT-291004 and DT-171104 altogether valued at some US$242,766, ought not to be taken into account in computing the amount of purchases in 2004. This was because, given the usual lead time for delivery of around three

months, it was more likely than not that the said orders would be met only in 2005. Besides, there was little documentary evidence to support the two orders (there were no order confirmations or proforma invoices). Lastly, I note that on 11 December 2004, the defendant had written to the plaintiff as follows:

> For many years you have achieved nearly U$1.0 million in annual purchases. This year (2004) your current purchases plus pending shipments amount to U$750,000.

The plaintiff's response was: "I don't deny, what you alleged here." In view of the foregoing, I find that the US$1m purchase target had indeed not been met in 2004.

18 On the face of it, the defendant's conduct in signing the Amendment on 24 January 2005 and then terminating the Letter of Agreement three days later on 27 January 2005 could be described as puzzling. However, on a closer examination of the correspondence between the two parties, one would observe that the defendant had been trying since November 2004 to invoke the non-competition clause when it became apparent that the plaintiff's purchases for 2004 would be unsatisfactory. It is also pertinent to note that even *after* a draft copy of the Amendment was sent by e-mail to the plaintiff on 23 December 2004, the parties were still attempting to resolve the competition issue.

19 For instance, on 11 December 2004, the defendant wrote to the plaintiff stating that:

> Paragraph 3 of our Agreement says: "Products which are in competition with Deuter range of products may not be sold by Sports Connection without prior written consent from Deuter." We have never given you written consent to sell competing products.
>
> For many years you have achieved nearly U$1.0 million in annual purchases. This year (2004) your current purchases plus pending shipments amount to U$750,000. In your Dec.3rd e-mail you propose for 2005 another drop to $500,000. One of the reasons must be because you are carrying so many competing products from the above mentioned brands.
>
> We have hydration packs, big sized packs like 50, 60, 70, 80L packs, accessories, ladies bags and trolley bags. (See Deuter catalog [*sic*]). Please, confirm with a fixed date when you will stop selling the competing products from: Osprey, Eagle Creek, Camelbak, High Sierra, Cerro Torre, Outdoor Products, Vertikal, Urban Equipment and Overland.

20 The plaintiff's reply on 16 December 2004 was:

> I don't deny, what you alleged here. It is more true in Martin's days compared to now, since I don't practise duplication of goods.
>
> Can you spare Eagle Creek and High Sierra, once I confirm dropping Osprey and CamelBak?

21 The defendant refused to accede to the plaintiff's request. On 18 December 2004, it wrote to the plaintiff, stating ominously that:

> As part of the agreement you are not to sell competing products. Even selling sleeping bags from another brand is selling a competing product. Please, refer to my "Statement to the Letter of Agreement" and give us a very near future calender [*sic*] date when you will stop selling competing products.

If you donot [*sic*] do this then we assume you want to discontinue the Agreement.

22 On 16 January 2005, the defendant wrote again to the plaintiff regarding the sale of competing products. It insisted that the plaintiff comply with the non-competition clause of the Letter of Agreement:

Subject: WG: PRODUCTS IN COMPETITION WITH DEUTER

Dear Terry,

In reference to your Jan. 12th telephone call, I reminded you that this important issue is still outstanding and we are waiting on your reply. We have clearly stated that you are required to stop selling those competing products. To date there is still no commitment from you to do this and your breach of the paragraph 3 of our Agreement still continues.

23 The above e-mail that was sent on 16 January 2005 was an important one given that it was sent just prior to the signing of the Amendment by the plaintiff (which took place on 19 January 2005). It was therefore patently clear to both the parties that the Amendment was limited only to the discounting and retailer issues. It had no bearing on the competition issue. Thus, even *after* the plaintiff had signed the Amendment on 19 January 2005, it came as no surprise that the defendant continued to press the plaintiff for an answer as to whether it would stop the sale of competing products (see the e-mails dated 21 and 25 January 2005). Things came to a head on 27 January 2005 when the plaintiff finally replied with an unequivocal "no". The defendant then served a notice of termination that very same day, with one of the grounds being the plaintiff's failure to undertake that it would cease selling products which competed with Deuter's own.

24 Taking into account all of the above, I am of the view that the Amendment did not amount to a waiver of the plaintiff's obligations under the non-competition clause, and that the latter's refusal to comply with the said clause was accordingly a breach of the Letter of Agreement.

25 Is the breach then a repudiatory one that would entitle the defendant to bring an end to the contract? In *Singapore Tourism Board v Children's Media Limited* [2008] SGHC 77, the court stated at [32] that:

To constitute repudiation, the threatened breach must be such as to deprive the injured party of a substantial part of the benefit to which he is entitled under the contract. The applicable test is whether the consequences of the breach are such that it will be unfair to the injured party to hold it to the contract and leave it to its remedy in damages as and when a breach occurred (*Highness Electrical Engineering Pte Ltd v Sigma Cable Co (Pte) Ltd* [2006] 3 SLR 640 at [8] to [11]).

26 In similar vein, the following observations by Buckley LJ in *Decro-Wall International SA v Practitioners in Marketing Ltd* [1971] 1 WLR 361 at 379 are also worth noting:

Each party to an agreement is entitled to performance of the contract according to its terms in every particular, and any breach, however slight, which causes damage to the other party will afford a cause of action for damages; but not every breach, even if its continuance is threatened throughout the contract or the remainder of its subsistence, will amount to a repudiation. To constitute repudiation, the threatened breach must be such as to deprive the injured party of a substantial part of the benefit to which he is entitled under the contract.

27 It must be recalled that the plaintiff acted as an exclusive distributor for the defendant. The sale of competing products by the plaintiff clearly put its own interests in conflict with the defendant's interests. To my mind, it is evident that the purpose of the non-competition clause (along with the US$1m understanding) was to ensure that the plaintiff would continue to look after the interests of the defendant (having regard to the former's other conflicting brands and interests). This is especially so as the plaintiff acted as an exclusive distributor for the defendant.

28 That said, to say that the interest sought to be protected by the non-competition clause consisted only of the US$1m purchase target, and nothing more, would be overly superficial as that would mean ignoring the market penetration and brand building objectives (which were express terms of the Letter of Agreement). Taking an objective view of the parties' relationship, I am of the view that the non-competition clause was in fact closely allied to the two aforesaid objectives (*ie*, market penetration and brand building).

29 In view of the plaintiff's failure to meet the US$1m purchase target, the non-competition clause could no longer be said to be "inactive". That being the case, the plaintiff's unequivocal refusal to cease selling competing products, deprived the defendant of a substantial part of the benefit to which it was otherwise entitled.

The essential change clause

30 For completeness, I shall now address the defendant's submission that, in the alternative, it was entitled to rely on the essential change provision to terminate the Letter of Agreement. In this regard, para 5 of the Letter of Agreement provided that:

> This agreement can be terminated by consent of both parties or if there is an essential change in the running of or financial situation of one of the businesses, which has the effect of influencing the results which the other party could legitimately expect from the execution of this agreement.

31 In respect of the above provision, it is clear beyond peradventure that the sale of competing products did not constitute an essential change in the running of the plaintiff's business, given that the plaintiff had always been selling competing brands of products. While it could be argued that the unprecedented discounts and the reduction in wholesale accounts constituted an essential change, I do not think that those two issues could be used against the plaintiff, given the parties' subsequent agreement to the Amendment.

32 This leaves us to consider whether there had been an essential change of the plaintiff's financial situation that could affect the defendant's legitimate expectations. In the defendant's rebuttal submissions (at para 32), it referred to para 25 of its Defence and Counterclaim, which states:

> Further or alternatively, the Defendants shall aver that the Plaintiffs' strategy of selling the Deuter products in their own retail outlets to the detriment of their obligation as distributors to a broad base of other retailers, in conjunction with the excessive discounts offered by the Plaintiffs, was motivated by the Plaintiffs' financial problems and/or an adverse change in the Plaintiffs' financial position, which rendered them unable and/or unwilling to fulfil the reasonable commercial expectations of the Defendants with respect to the Distributorship Agreement, thereby entitling the Defendants to terminate the same.

33 As can be seen from the above, the plaintiff's financial situation (in relation to the defendant's legitimate expectations) was intricately linked to the issues of discounting and wholesale accounts.

As I had observed earlier at [11] above, those two issues had already been resolved by the Amendment. In view of the foregoing, I am of the view that para 5 of the Letter of Agreement could not be relied upon by the defendant. Such a finding would, however, make little difference to the outcome of the case, given my earlier finding that the defendant was entitled to terminate the Letter of Agreement as a result of the plaintiff's breach of the non-competition clause.

Conclusion

34 The plaintiff's claim in this regard is accordingly dismissed.

35 As I have found that the plaintiff's refusal on 27 January 2005 to desist from selling competing products was a breach of the Letter of Agreement, it follows that the defendant's counterclaim in this respect ought to be allowed. Accordingly, I grant interlocutory judgment to the defendant on the counterclaim with damages to be assessed by the Registrar.

36 I will hear the parties on costs.