XFactor Consolidated (M) Sdn Bhd v IT21 (Singapore) Pte Ltd and Others
[2009] SGHC 123

Case Number : Suit 387/2006

Decision Date : 20 May 2009

Tribunal/Court : High Court

Coram : Choo Han Teck J

Counsel Name(s) : Salem Ibrahim and Masayu Norashikin Bte Mohamad Amin (Salem Ibrahim & Partners) for the plaintiff; Foo Say Tun and Audrey Ho (Wee Tay & Lim) for the defendants

Parties : XFactor Consolidated (M) Sdn Bhd — IT21 (Singapore) Pte Ltd; EDIT21 (International) Pte Ltd; Tan Cheng Hua

Contract

Civil Procedure

20 May 2009 Judgment reserved

Choo Han Teck J:

1 The plaintiff is a Malaysian company carrying on the business of a business consultant in information technology. It was at all material times owned by the first and second plaintiffs' witnesses, Ian Anderson and his wife Wendy Anderson. The first defendant is a Singapore company that was at all material times carrying on the business of designing and developing multimedia software. It has a paid up capital of $4.25m. The second defendant is a sister company of the first defendant and was also carrying on the same business as the first defendant. It has a paid up capital of $2.00. The third defendant is a director and major shareholder of the first and second defendants. He was also the managing director of the first defendant. The first and second defendants have related companies. They are iT21 (International) Pte Ltd and EdiT21 (Malaysia) Sdn Bhd. The third defendant appears to have a financial interest in these two companies. The first defendant owned educational software which included "Tamil titles" and "Chaos and Order titles". These were specific course materials in CD-rom format and were part of the subject matter of the plaintiff's claim. The plaintiff's present action was based on the claim that it would receive payment if it was able to get the Malaysian Ministry of Education ("MMOE") to purchase the first defendant's educational material. The plaintiff's claim as pleaded and the evidence adduced were not clear and in parts, incomprehensible. Mr Foo Say Tun, counsel for the defendants, was right in saying that the plaintiff's claim was based on two grounds, first, a Distribution Agreement ("DA") dated 3 September 2002, and secondly, an alleged joint venture between the plaintiff, a company called Langkah Harapan Sdn Bhd ("Langkah Harapan"), and the first defendant.

2 The DA was executed between Ian Anderson on behalf of the plaintiff and the third defendant on behalf of the second defendant. The DA was executed on 3 September 2002 before an advocate & solicitor, Tan Chye Kwee. The subject matter of the agreement was educational software titles set out in Annex A of the DA. The list in Annex A does not include the "Tamil titles" or the "Chaos and Order titles" that the plaintiff alleged were part of the agreement. In this respect, the plaintiff's claim in respect of those titles must fail. It also follows that it would have made no difference whether the DA should have been signed by the first defendant instead of the second defendant. The plaintiff pleaded in paragraph 9 (b) of its Statement of Claim (amended several times over) that "although the

2nd Defendant is apparently the party to the [DA], the Plaintiff was dealing with the 1st Defendant at all material times, and as such, it is the 1st Defendant who is/ought to be the actual party to the Agreement". The plaintiff and the first defendant are bodies corporate and cannot be "dealing" with each other unless the plaintiff was referring to specific exchanges of correspondence on this point, but it was not. The evidence showed that for all the dealings and agreements there might have been, the negotiations were carried out among the Andersons and the third defendant. Indeed, that was why the plaintiff pleaded as its "Second Alternative" (paragraph 9 (d)) that there was an "oral agreement between the Plaintiff and the 1st Defendant". Similarly, if there was an oral agreement, it cannot have been made by the plaintiff or the first defendant as a body corporate. Who made that oral agreement on their behalf? Furthermore, if there was an oral agreement, what exactly were the terms of that agreement? The only clear evidence was that the DA was executed in a solicitor's office and there was no dispute that the DA was an agreement between the plaintiff and the second defendant. The critical terms of the DA provided in cl 1.1 stated as follows:

> Subject to the terms and conditions of this Agreement, [the second defendant] hereby appoints [the plaintiff] as the exclusive distributor for the period stated in Clause 2 below, within the territory of Malaysia only (hereinafter referred to as "the territory") with respect to the promotion, distribution and sale of CD-ROMS listed in Annex A of this Agreement and hereinafter referred to as ("the Products"). The Products listed in Annex A may be updated, at the sole discretion of the [second defendant], from time to time to include new Products developed by [the second defendant].

In any event, as I mentioned, even if the DA was supposed to be or in fact, an agreement between the plaintiff and the first defendant (a finding which I am not prepared to make), it would not have assisted the plaintiff because the subject matter of its claim was clearly not set out in the Annex. In this regard, I accept the evidence of Prabha Dube and Ang Siew Ing that no representation was made to the plaintiff's representative at the execution of the DA that the second defendant was executing it on behalf of the first defendant.

3 The plaintiff made an alternative claim in that it had a "joint-venture/ partnership" agreement with the first defendant/third defendant and Langkah Harapan, which the plaintiff says was its agent. This was the point where the plaintiff's claim and its evidence were so muddled that it was impossible to make any sense of it. The plaintiff also pleaded as an alternative claim that the DA was an oral agreement (paragraph 24 of the Statement of Claim). It is permissible in law to plead alternative rights arising from a set of facts, but one cannot plead alternative facts. The plaintiff was entitled to claim for loss of profits by reason of breach of contract, but to do so it must first identify the contract. The plaintiff, however, was unable to state whether the contract that was breached was the DA (which the first and third defendants were not privy to) or a contract which was made between the plaintiff and the second defendant, or the third defendant. It was also unclear whether that contract was a partnership contract or a joint-venture. It may be said, loosely, that every partnership is a kind of joint-venture; but not every joint-venture is a partnership. In either case, details of the contract must be pleaded as well as the precise nature of the breach. None of this was done. It was not possible to understand what the precise nature of the contractual relationship was. Neither was it clear who the contracting parties were. The plaintiff was simply unable to set out its case. On the pleadings and the evidence adduced there was nothing for the defendants to answer.

4 The plaintiff alluded vaguely that the joint-venture/partnership was formed to obtain a distributorship contract with the MMOE. In the event, MMOE awarded a contract to Langkah Harapan solely. Neither Langkah Harapan's representatives nor the MMOE officers were called to corroborate its claims. The plaintiff's only witness on this point was one Ahmad Faudzi whose allegiance swung

between the plaintiff and the defendants. He testified on the plaintiff's behalf at trial, as the plaintiff's re-employed employee. He was previously working for Langkah Harapan (but paid by the plaintiff), and in connected, if not the same, legal proceedings in Malaysia ("the Malaysian suits") Ahmad Faudzi was a co-plaintiff of the defendants who were plaintiffs in the Malaysian suits. The roles of the parties were reversed in the Malaysian suits. There the plaintiff was a defendant with a counter claim. I do not find Ahmad Faudzi to be a reliable witness. It was hard to tell when he was the hunter and when the hunted. The fact that MMOE appointed Langkah Harapan had no implications on any of the defendants, except to note that the plaintiff subsequently made separate arrangements with Langkah Harapan (to the exclusion of the second defendant) in respect of the revenues from the MMOE contract. I find that no right accrued to the plaintiff in respect of the inadequately pleaded "joint-venture/partnership". Furthermore, the documentary papers including the Malaysian cause papers indicate that the MMOE contract was a major issue for trial there. Ahmad Faudzi admitted that on the third defendant's instructions, he instigated MMOE to terminate the Malaysian contract.

5 I now come to the Malaysian suits. The second and third defendants as well as a related Malaysian company, iT21 (International) Pte Ltd were involved in two suits, known as D7-22-165-2003 and D1-22-44-2004 with the plaintiff, Langkah Harapan and various other parties in Malaysia in disputes that concerned the same facts with variations so far as I can see from parts of the Malaysian cause papers referred to before me. It seemed that the full sets of the cause papers in the two Malaysian suits have been disclosed. Counsel conceded that the two suits have been held in abeyance in Malaysia. It was obvious that although the DA was executed in Singapore, the facts that gave rise to the dispute between the parties were too closely connected to the Malaysian suits that it would have been more sensible to include the present claim and counter-claim in the Malaysian action. No reason was advanced by counsel for the defendants as to why they had not applied to have this action struck out or stayed. When I perused those parts of the cause papers in respect of the Malaysian suits that were disclosed in the proceedings before me, I sensed that the actions there lapsed into inaction because they were also badly pleaded and prosecuted. The business venture between the plaintiff and the defendants seemed to be one flowing venture but was inexplicably chopped up into the Malaysian suits and the present proceedings before me. I do not think this action helped either side because the full story was not told and the evidence too patchy to form any plausible case. I think that it was a mistake to leave a substantial part of the case in Malaysia while pursuing another part here. If this was a discrete action my opinion would have been different. But I am not satisfied that the plaintiff had pleaded or proved any discernible action here that entitled it to relief or compensation. Accordingly, the plaintiff's claim is dismissed.

6 I now address the second defendant's counter-claim for $899,990.00 under cl 6.1 of the DA. There was no evidence that the plaintiff had placed any order, nor was there any evidence that the second defendant had delivered any product or goods to the plaintiff to the value of $1,000,000 as specified. That did not mean that the second defendant had succeeded in its claim. All that cl 6.1 of the DA provided was that the plaintiff would be given the right of exclusive distributorship if it met the minimum orders. Since the plaintiff did not meet the minimum order it was not entitled to an exclusive right of distributorship. I set out cl 6.1 below for the sake of clarity:

> In respect of the promotion, distribution and sales of the Products within the territory, the distributor shall fulfil the minimum order by paying to [the second defendant] the sum of Singapore Dollars One Million (S$1,000,000) in order to have the benefit of the exclusive distributorship but not otherwise. The sum of Singapore One Million (S$1,000,000) shall be paid in the following manner:
>
> a) upon signing - $100,000

b) within 12 months from the date of this Agreement - $900,000

7 For the reasons above, the counterclaim is also dismissed. In view of the findings I had made, including my view that these proceedings should not have been prosecuted in Singapore, and if they did, the claim and counter-claim had to be more cogently pleaded, I order each party to bear his own costs.